Supreme Court, U.S.
FILED
MAY 25 1984
ALEXANDER L. STEVAS
CLERK

(1)

83 - 1930
No.

IN THE

Supreme Court of the United States

October Term, 1983

MANUEL LECAROZ PASARELL,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

DAVID COHEN, P.C.
Attorney for Petitioner
200 North Main Street
P. O. Box 70
Liberty, NY 12754
(914) 292-8020

---

107 pp

Questions Presented.

1. Did the First Circuit Court of Appeals err in its application of its own test for ineffective assistance of counsel, where trial counsel for petitioner failed to present other available defenses and failed to adequately present the defense of insanity such that petitioner was unfairly prejudiced?

2. Given the conflict among the United States Circuit Courts of Appeals regarding the tests for ineffective assistance of counsel, should this Court establish a federal standard of review in these cases, where similar facts result in dissimilar results depending upon the Circuit in which the case is tried and the test applied?

3. Did the First Circuit fail to acknowledge the unfairly prejudicial effects of the Government's misstatement of evidence in summation, the clear error of the admission of inflammatory evidence at trial, and the absence of curative jury instructions, such that petitioner was deprived of his right to a fair trial?

Table of Contents.

	Page
Questions Presented	i
Table of Authorities	
Opinions Below	1
Jurisdictional Statement	2
Constitutional Provision and Statute Involved ...	2
Statement of the Case	3
Reasons for Granting Writ	7
1. The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court regarding the effective assistance of counsel	7
2A. The Circuit Courts of Appeal are in such conflict regarding the right to counsel as to call for this Court's power of supervision	12
2B. The First Circuit application of the right to effective assistance of counsel is in conflict with other Circuit Courts of Appeal	14
3. The First Circuit countenanced prosecutorial misstatement and improper admission of evidence at trial depriving Petitioner of his Sixth Amendment rights and requiring this Court's intervention	19
Conclusion	25

INDEX TO APPENDIX.

Page

Appendix A—Opinion of the United States Court of Appeals for the First Circuit 1a

Appendix B—Order of the Circuit Court Denying Reargument 1b

Appendix C—Order of the Circuit Court Making Petitioner's Pre-Conference Report Part of the Record on Appeal 1c

Appendix D—Order of the United States District Court for the District of Puerto Rico Granting Counsel's Motion to Inspect Petitioner's Pre-Sentence Report and Denying That it be Made Part of the Record on Appeal 1d

Appendix E—Order of the District Court Pursuant to §4244, Title 18 U. S. C. That Petitioner Undergo a Mental Examination 1e

Appendix F—Order of the District Court Specifying Methods and Conditions of Release 1f

Appendix G—Excerpts From Transcript 1g

Pedro Tirado 1g

Lydia Pasarel de Lecaroz 14g

Margarita Pasarell de Kleis 17g

Page

Richard Benitiz 18g

Carlos Alvarez 23g

Dr. Manuel Garcia 24g

de Thomas 36g

Lopez 41g

Court's Charge 44g

Sentencing 50g

TABLE OF AUTHORITIES.

CASES:

Boyer v. Patton, 579 F. 2d 284, 288-9 (3d Cir. 1978) 13

Bridges v. Wixon, 326 U. S. 135 (1945) 24

Chapman v. California, 386 U. S. 18 (1967) 7, 24

Coles v. Peyton, 389 F. 2d 224, 226 (4th Cir. 1968) 16

Cooper v. Fitzharris, 586 F. 2d 1325, 1333 (9th Cir. 1978) 13

Gaines v. Hopper, 575 F. 2d 1147 (5th Cir. 1978) 13, 15

Gideon v. Wainwright, 372 U. S. 335 (1963) 7, 14

Page

Goodwin v. Balkom, 684 F. 2d 794 (11th Cir. 1982) 16

Hampton v. United States, 425 U. S. 484 (1976) . 9

Herring v. New York, 422 U. S. 853 (1975) 7

In re Saunders, 2 Cal. 3d 1033, 88 Cal. Rptr. 633, 472 P. 2d 921 (1970) 10, 19

Maryland v. Marzullo, 435 U. S. 1011 (1978) 14

McMann v. Richardson, 397 U. S. 759 (1970) 7, 8, 10, 11, 12, 25

McQueen v. Swenson, 498 F. 2d 208, 220 (8th Cir. 1974) 15, 16

Moore v. United States, 432 F. 2d 730 (3d Cir. 1970) 18

Powell v. Alabama, 287 U. S. 45 (1932) 7, 11

Romero v. United States, 103 S. Ct. 236 (1982) .. 12

Shepherd v. United States, 290 U. S. 96, 102-106 (1933) 24

Summers v. United States, 538 F. 2d 1208 (5th Cir. 1978) 13, 16

Taylor v. Starnes, 650 F. 2d 38, 41 (4th Cir. 1981) 13

Thomas v. Wyrick, 535 F. 2d 407, 414 (8th Cir. 1976) 14, 16

Page

United States v. Atkinson, 297 U. S. 157, 159-160 (1936) 24

United States v. Aulet, 618 F. 2d 182 (2d Cir. 1980) 12, 13

United States v. Baynes, 687 F. 2d 659 (3d Cir. 1982) 14

United States v. Bosch, 584 F. 2d 1113, 1121 (CA-1, 1978) 7, 8, 12

United States v. Buege, 578 F. 2d 187 (7th Cir.), cert. den. 439 U. S. 871 (1978) 18

United States v. Carignan, 600 F. 2d 762 (9th Cir. 1979) 18

United States v. Cronic, 675 F. 2d 1126 (CA-10, 1982), cert. granted 103 S. Ct. 1183 (1983) 9

United States v. DeCoster, 624 F. 2d 196, 208 (D. C. Cir. 1976) 13, 16, 17

United States v. Frady, 456 U. S. 152, 170 (1982) 17

United States v. Green, 648 F. 2d 587 (9th Cir. 1981) 23

United States v. Green, 680 F. 2d 183, 188 (D. C. Cir. 1982) 13

United States v. Johnson, 565 F. 2d 179 (1st Cir. 1977) 9

United States v. Morgan, 115 U. S. 69 (1885) ... 23

Page

United States v. Morris, 568 F. 2d 396, 402 (5th Cir. 1978) 22

United States v. Morrison, 449 U. S. 361 (1981) . 7

United States v. Newman, 490 F. 2d 139 (3d Cir. 1974) 22

United States v. Ortiz Oliveras, 717 F. 2d 1 (CA-1, 1983) 7, 8, 9, 10

United States v. Porterfield, 624 F. 2d 122, 124-5 (10th Cir. 1980) 13, 15

United States v. Rabelo, 496 F. 2d 868 (9th Cir. 1979) 18

United States v. Ramos, 572 F. 2d 360 (2d Cir. 1978) 18

United States v. Warledo, 557 F. 2d 721 (10th Cir. 1977) 24

Washington v. Strickland, 693 F. 2d 1243, 1263 (5th Cir. 1982), cert. granted 103 S. Ct. 2451 (1983) 13, 17, 19

Wright v. Estelle, 572 F. 2d 1071, 1084 (5th Cir. 1978) 13

CONSTITUTIONAL PROVISIONS AND STATUTES:

Sixth Amendment 2, 7

F.R.C.P. Rule 29(a) 4

21 U. S. C. §841(a)(1) 2, 4, 7

28 U. S. C. §1254 2

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

MANUEL LECAROZ PASARELL,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The February 8, 1984 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at F. 2d , and is reprinted in the separate appendix to this Petition (Appendix A).

Jurisdictional Statement.

The judgment of the Court of Appeals was entered on February 8, 1984 (Appendix A). Reargument was denied on March 26, 1984 (Appendix B). The jurisdiction of this Court is invoked under 28 U. S. C. §1254.

Constitutional and Statutory Provisions Involved.

This case involves the Sixth Amendment to the Constitution of the United States, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The statute under which petitioner was prosecuted, although petitioner makes no argument with respect to it, is 21 U. S. C. §841(a)(1), which provides as follows:

> §841. Prohibited acts A
>
> Unlawful acts
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

Statement of the Case.

The petitioner, Manuel Lecaroz Pasarell, had been a successful businessman (App. G at p. 2g) with absolutely no prior involvement with the civil authorities. In late 1981, he had been suffering strain from the recent and violent death of his brother (App. G at pp. 11g, 14g-15g, 17g-18g), had fallen into alcohol (App. G at pp. 12g, 17g-18g) which exacerbated his long-standing psychological problems (App. G at pp. 18g-21g, 26g). Prior to this, in the spring of 1981, he was approached by his cousin, Tirado, to whom he gave employment (App. G at pp. 1g, 3g), whom he took into his home (App. G at p. 24g), whom he saw on a daily basis and with whom he was an intimate friend (App. G at pp. 1g, 2g). After approximately four months, his cousin was approached by agents of the Drug Enforcement Administration and he offered to work for them (App. G at pp. 3g-5g). In November, 1981, his cousin, Tirado, gave "the petitioner comfort through the shock of his brother's violent death," was "among the first in line at the funeral," embraced him "at all times during that sorrowful moment," and thereafter was "more or less his constant companion" (App. G at p. 11g). Just a few weeks later, this same cousin, Tirado, having nothing to report to the D. E. A., approached the petitioner complaining that he ostensibly lost $2,000 from buying bad cocaine (App. G at p. 6g). In response to his cousin's call for aid, petitioner offered to help him procure cocaine (App. G at p. 7g). After false starts, Tirado received less than two ounces of cocaine (App. G at p. 9g), an amount which the prosecutor declared "was not large by any stretch of the imagination" (App. G at p. 50g). Additionally, the

petitioner made little or no profit on the transaction (App. G at p. 9g). Subsequent to this incident, there is no proof of any transaction offered in the record until the indictment was filed six months later on June 6, 1982.

Petitioner's attorney refused to employ an entrapment defense, contrary to petitioner's wishes (App. A at pp. 8a-9a). The record indicates no questions on direct or cross-examination regarding entrapment. Instead, the trial attorney pursued the defense of insanity which the District Court characterized as "filmy, flimsy, transparent" (App. G at p. 51g). Further, though he pleaded insanity, the trial attorney "offered no testimony on defendant's state of mind or his ability to conform his behavior to the requirements of the law on the day of the crime" (App. A at p. 4a) (App. G at pp. 27g-32g).

At the trial, the government presented its case in two parts. First, it entered evidence regarding the substantive offense under §841(a)(1) of Title 21 of the United States Code for the drug charge. Then, after the defense had presented evidence regarding Mr. Pasarell's insanity, the government was permitted to reopen its case in chief for the purpose of rebutting the evidence of defendant's insanity, that is, to prove sanity beyond a reasonable doubt.

At the close of the prosecution's case-in-chief, the defense moved for acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. The motion was denied by the Court stating that defendant's actions were those "of a very, very—of a man very well within his own reality . . ." (App. G at p. 49g).

Richard Benitez, a neighbor and business associate of petitioner, testified for the defense reciting his knowledge of peti-

tioner's extreme behavior, including what he believed to be an attempted suicide after his brother's death. Mr. Benitez was cross-examined by the prosecutor concerning statements he made some two years earlier to a police investigator in connection with petitioner's application for a weapons permit. The document completed by the investigator was shown to Benitez. The allegedly contradictory statements recorded there were not, however, brought specifically to his attention. He was not directed to them. They were not read to him. He was not asked if he had ever made any statements which contradicted his testimony concerning petitioner's mental condition. Mr. Benitez could not recall the interview at all (App. G at pp. 21g-22g). Carlos Alvarez, a friend of petitioner, testified that on July 27, 1982, he took petitioner to the office of Dr. de Thomas, the government's expert medical witness, and waited eighteen minutes for his examination to be completed. At the close of the defense, Mr. Monserrate again moved for dismissal pursuant to Rule 29(a) on various, unstated constitutional grounds that allowing the prosecution to reopen its case after all of petitioner's evidence had been presented was unfairly prejudicial.

Mr. de Jesus reopened his case-in-chief with Dr. Antonio de Thomas, Jr., who had examined petitioner pursuant to Court order to determine his competency to stand trial. Based upon this interview (lasting no more than eighteen minutes), subsequent review of petitioner's medical history from other, secondary sources, and the government's tape recording of the drug transaction, Dr. de Thomas testified that he did not "have evidence to sustain that he [defendant] was not aware between right and wrong at the time of the commission of the offense" (App. G at p. 38g); that he did not "have evidence to give an opinion in terms of what mental condition he [defendant] had at such date but in view of my evaluation and other facts that I have received, I don't

have evidence to sustain that he was psychotic at that time" (App. G at pp. 37g-38g); and finally, "Well, in view of the examination I performed and the facts that I have, I have no evidence to say that he [defendant] was not aware between right and wrong" (App. G at p. 39g).

At the close of its case, the government called Estilito Ayala Lopez, a police investigator, who identified for the record two documents from a weapons permit application made by petitioner some two years earlier. These two documents, admitted into evidence over defense objections, consisted of statements made by petitioner and Edward Benitez purporting to rebut the insanity defense (App. G at pp. 41g-43g).

Both parties summed up their cases for the jury. In the course of the government's summation, A.U.S.A. de Jesus stated that Dr. de Thomas testified that "Manuel at the time of December 24, 1984 (*sic*), did have a substantial capacity," and immediately after defense counsel's objection, he repeated that defendant "had the substantial capacity to appreciate the capacities of is (*sic*) conduct and that he could conform his conduct as to the requirements of the law" (App. G at p. 43g).

Thereafter, the charge was given but without any limiting instruction regarding the prosecutor's misstatement (which he continued to maintain even on appeal was not a misstatement at all). While the jury deliberated, the Judge and the two attorneys discussed a corrective charge but as the jury returned, the Judge changed his mind and declined to give it (App. G at pp. 45g-49g).

Reasons for Granting the Writ.

Petitioner was convicted in the District Court for the District of Puerto Rico of One Count of Distributing a Controlled Substance, under Title 21, United States Code, §841(a)(1).

1. The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court regarding the effective assistance of counsel.

The Supreme Court has always been solicitous of the Sixth Amendment's guarantee to the right of counsel. *Powell v. Alabama,* 287 U. S. 45 (1932); *Gideon v. Wainwright*, 372 U. S. 335 (1963). In *McMann v. Richardson*, 397 U. S. 759 (1970), this Court addressed the issue of effectiveness of counsel's performance, exclusive of any so-called "outside interference" (see, e.g., *Herring v. New York*, 422 U. S. 853 [1975]; *Chapman v. California*, 386 U. S. 18 [1967]; *United States v. Morrison*, 449 U. S. 361 [1981]). In *McMann, supra*, this Court held that the Sixth Amendment mandated that a felony defendant was "entitled to effective assistance of competent counsel" whose "advice was within the range of competence demanded of attorneys in criminal cases" (*id.* at p. 771). In *United States v. Bosch*, 584 F. 2d 1113, 1121 (CA-1, 1978), the First Circuit, following the lead, adopted the reasonably competent assistance standard, finding that assistance was ineffective where defendant's attorney's offer of damaging evidence which referred to his client's prior convictions, arose from neglect or ignorance rather than from informed, professional deliberation. The First Circuit continued this standard in *United States v. Ortiz Oliveras*, 717 F. 2d 1 (CA-1, 1983), and held counsel was effective, even though he presented

a rather weak argument in an effort to exclude certain testimony, because it appeared to be the only argument available and because there was "no convincing evidence of the existence of viable defenses which counsel had overlooked" (*id.* at 4). Unlike *Bosch* (*supra*, at 1122), the Court did not feel that counsel's defense decision was "so completely unreasonable" that it bore "no relationship to a possible defense strategy . . ." (*Ortiz Oliveras, supra*, at 4). In light of the prosecution's very strong case and lack of viable defenses, counsel's assistance fell within the reasonably competent standard.

In application of these standards to the facts at bar, the First Circuit has made a rapid and drastic departure from the spirit of *McMann, supra,* as well as its own precedents noted above.

The petitioner Pasarell was a local businessman who did not need to make money from dealing in drugs (App. G at pp. 1g-2g). He had no prior involvement with the law. His cousin, Tirado, working with D. E. A. Agents, worked with him and lived with him from April until July, 1981, and kept in close contact with him thereafter. There were no incidents of drug dealing reported at trial throughout his nine-month period, despite this close surveillance. In November, 1981, petitioner's brother died a violent death and this, understandably, affected and exacerbated petitioner's psychological problems. Tirado comforted his cousin through this difficult period, "was among the first in line at the funeral," embraced him "at all times during that sorrowful moment," and thereafter was "more or less his constant companion" (App. G at p. 11g). After having ingratiated himself in these ways, a few weeks later on December 22, 1981, Tirado approached the petitioner, ostensibly complaining that he had lost money from buying bad cocaine and "that it was a pity because if it had

been good, I would have bought more" (App. G at p. 6g). According to Tirado, the only witness to this incident to testify, the petitioner then responded by offering to help him by finding cocaine for him (App. G at p. 7g). After false starts, he did procure the cocaine, an amount which the prosecutor conceded was "not large by any stretch of the imagination" (App. at p. 50g). Further, it is apparent that Pasarell made little or no profit (App. G at pp. 17g-18g). During the six-month period after this incident, during which the prosecutor waited to file his indictment, no further incidents of this nature were reported.

One incident, no priors, no profit, no motive to procure, except to help a "good" friend.

Where a predisposition to commit a crime is the hallmark of entrapment, *Hampton v. United States*, 425 U. S. 484 (1976), the facts here do not merely call for the entrapment defense, they fairly well scream for it. This is particularly so in the First Circuit which requires the government to show its agents' conduct was not offensive, as well as predisposition. *United States v. Johnson,* 565 F. 2d 179 (1st Cir. 1977).

This is not a case like *Ortiz Oliveras, supra,* where there was no convincing evidence of the existence of a viable defense. While the prosecutor could point to matters which incriminated the defendant as his knowledge (App. G at p. 9g), his ability to find more (App. G at pp. 8g-9g), these are rebuttable or could have been explained by the petitioner, had his attorney allowed him to testify. The government's case here was not so strong or overwhelming, as in *Ortiz Oliveras (supra).* Neither is this case like *United States v. Cronic,* 675 F. 2d 1126 (CA-10, 1982), cert. granted 103 S. Ct. 1183 (1983), where the facts were very complicated and the attorney inexperienced and the time to prepare

minimal. Here, the trial attorney's failure to recognize or refusal to employ such a patent entrapment defense was "serious dereliction" and not "ordinary error," as envisioned by *McMann* (*supra*, at 774).

Further, the entrapment defense was not inconsistent with the insanity defense. The jury might have found that, though he was not insane, his will was weakened and he was more easily swayed. This is particularly so given the close and intimate relationship he had with his cousin, Tirado (App. G at p. 1g). For trial counsel not to press a strong and consistent additional defense was within the "completely unreasonable" language of *Ortiz Oliveras* (*supra*, at 4). See *In Re Saunders*, 2 Cal. 3d 1033, 88 Cal. Rptr. 633, 472 P. 2d 921 (1970). There, the California Supreme Court overturned a lower Court, where the defendant's attorney failed to investigate or use a relevant and useful defense of which he was aware.

Yet, the First Circuit glosses over all this by preemptorily stating, "The record in this case reveals that the entrapment defense was unlikely to succeed" (App. A at p. 9a). Further, the Court below did not find that the defendant's attorney's performance was "outside the range of competence expected of attorneys in criminal cases" (App. A at p. 9a). It held this despite the fact that trial counsel failed to cross-examine Tirado regarding whether he ever approached petitioner before or after the incident, whether he had coaxed the petitioner, or any of a myriad of questions which would flesh out entrapment. In fact, there was no penetrating cross-examination at all.

Instead, trial counsel pursued the insanity defense, which the trial Court characterized as "filmy, flimsy, transparent" (App. G at p. 51g). While the First Circuit praised counsel

by noting that "he vigorously and competently represented him throughout the trial" (App. A at p. 9a), the contrary is painfully apparent. The First Circuit itself found that counsel, in pursuit of the insanity defense, "offered no testimony on defendant's state of mind or his ability to conform his behavior to the requirements of the law on the day of the crime" (App. A at p. 4a) (App. G at pp. 27g-32g).

Clearly, the above facts demonstrate the gross error on the part of counsel, as envisioned by *McMann* (*supra*, at 771). But seemingly ignoring these points, the First Circuit never even reached the question of whether there was prejudice by finding the petitioner received reasonably competent assistance. The Court observed that if "appellant disagreed with the strategy of his chosen counsel, his remedy was to find a different lawyer before trial . . ." (App. A at p. 9a). That sentiment smacks against prior guidance of this Court, when it noted:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incomplete evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Powell v. Alabama*, 287 U. S. 45, 69 (1932).

There comes a time when a layman must repose his faith in professionals, whether surgeon, pilot or attorney. Manuel Pasarell may have felt that he was set up, betrayed, entrapped, but Manuel Pasarell was in the music business.

The burden of choosing adequate defenses should not be left to defendants, rather, "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts" (*McMann, supra*, at 771).

The First Circuit, in summarily denying petitioner's claim of ineffective assistance of counsel without further inquiry, pays lip service to its own decision in *Bosch, (supra),* and is at variance with *McMann*. Its "reasonably competent assistance" test as applied is no test at all.

2A. The Circuit Courts of Appeal are in such conflict regarding the right to counsel as to call for this Court's power of supervision.

The results which would be reached after applying the facts of this case to the other Circuits' rules regarding the ineffectiveness of counsel is entirely open to question. There is no uniformity of decision among the Circuits because there is no uniformity of formulae.

The Circuits generally follow *McMann's* lead of a lawyer's performance being "within the range of competence demanded of attorneys in criminal cases" (*McMann, supra,* at 771). A notable exception is the Second Circuit's farce and mockery test. *United States v. Aulet*, 618 F. 2d 182 (2d Cir. 1980); *Romero v. United States*, 103 S. Ct. 236 (1982) (White, J. dissents from denial of cert.).

Beyond this desirable yet general goal, the Circuits come quite apart. The Eleventh and Second Circuits require a showing of actual detriment or prejudice once ineffectiveness has been found. *Washington v. Strickland*, 693 F. 2d 1243, 1263 (5th Cir. 1982), cert. granted 103 S. Ct. 2451 (1983); *United States v. Aulet* (*supra*, at 188). The Third Circuit held prejudice can be found as a matter of law. *Boyer v. Patton*, 579 F. 2d 284, 288-9 (3d Cir. 1978). In *United States v. DeCoster*, 624 F. 2d 196, 208 (D. C. Cir. 1976), the D. C. Circuit required a showing of only a likelihood that counsel's inadequacy effected the outcome of the trial. However, in *Wright v. Estelle*, 572 F. 2d 1071, 1084 (5th Cir. 1978), Judge Godbold observed just the opposite, that a defendant need not show that counsel's ineffectiveness affected the outcome of trial. (Accord, *Cooper v. Fitzharris*, 586 F. 2d 1325, 1333 [9th Cir. 1978].) The Fifth and Tenth Circuits appear to concentrate on the effectiveness of counsel rather than a showing of prejudice. *Gaines v. Hopper*, 575 F. 2d 1147 (5th Cir. 1978); *Summers v. United States*, 538 F. 2d 1208 (5th Cir. 1978); *Wright v. Estelle, supra*, at 1084. In *United States v. Porterfield*, 624 F. 2d 122, 124-5 (10th Cir. 1980), where counsel's inadequacies were fairly extensive and where the government argued that a showing of prejudice was required, the Court disagreeing, answered, "It is not accurate, however, to conclude that 'prejudice' is a second tier in the test of incompetency. Reasonable dilligence and skill is the test!"

As though this were not enough variation, in the Circuits which do require a showing of prejudice to the defendant's case, there is a substantial disagreement as to who must carry the burden of showing whether the errors were harmless. The D. C. and Fourth Circuits require that the government show the errors were harmless beyond a reasonable doubt. See *Taylor v. Starnes*, 650 F. 2d 38, 41 (4th Cir. 1981); *United States v. Green*, 680 F. 2d 183, 188 (D. C. Cir. 1982).

But the Third Circuit would have the defendant prove that counsel's errors were not harmless beyond a reasonable doubt. See *United States v. Baynes*, 687 F. 2d 659 (3d Cir. 1982). The Eighth Circuit has found yet another variation on this theme, when it adopted a "flexible approach," generally imposing the burden on petitioner. *Thomas v. Wyrick*, 535 F. 2d 407, 414 (8th Cir. 1976).

In comparing and applying the facts of this case to the rules across the Circuits, one is at a loss in locating a point of departure. Justice White's observation that "the federal Courts of Appeal are in disarray" on this question was clearly understatement. *Maryland v. Marzullo*, 435 U. S. 1011, (1978) (White, J., dissenting from denial of cert.).

This Court acted in *Gideon v. Wainwright*, 372 U. S. 335 (1963), to promote the enjoyment of the right to counsel among the states. It is respectfully submitted that it should likewise promote a uniformity of that right among its own Circuits.

2B. The First Circuit application of the right to effective assistance of counsel is in conflict with other Circuit Courts of Appeal.

While it is difficult to trace the routes the different Circuits take in their efforts to insure effective representation, it is possible to compare the results they have reached in the cases similar to this, dealing purely with counsel's effectiveness and not a lack of representation due to outside interference.

In *Thomas v. Wyrick*, 535 F. 2d 407 (8th Cir. 1976), the Eighth Circuit used the test of whether a reasonable investigation would have uncovered evidence "which would have proved helpful to the defendant either on cross-

examination or in his case-in-chief at the original trial" (*id.* p. 416) (citing *McQueen v. Swenson,* 498 F. 2d 208, 220 [8th Cir. 1974]). Since the attorney failed to interview readily accessible witnesses, the information from whom would have allowed counsel to "vigorously pursue the state's witnesses," on cross-examination (*id.* pp. 415-416) the Court found counsel's assistance ineffective and remanded for a writ of habeas corpus, subject to the state's right to retry. It appears nowhere in the record here that petitioner's attorney ever interviewed the state's witness. Not only might this have helped his case-in-chief but it certainly would have provided for the cross-examination of Tirado. See also, *United States v. Porterfield,* 624 F. 2d 122 (10th Cir. 1980), where the attorney failed to conduct an investigation which could well have turned up a witness, which "if the witness had known of the facts which would have established the defense of entrapment, it is possible that it could have contributed to the development of his defense" (*id.* p. 124). So much worse the facts of the case at bar. Not only was the entrapment defense easily apparent and witnesses readily available, but as the First Circuit noted, Pasarell's attorney "refused to employ an entrapment defense, contrary to appellant's wishes" (App. A at p. 9a).

In *Gaines v. Hopper,* 575 F. 2d 1147 (5th Cir. 1978), as a result of little effort on the part of the defendant's attorney to investigate, counsel failed to properly understand his client's case and consider its possibilities. In affirming the grant of habeas corpus relief, the Court noted, "informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." (*id.* pp. 1149-50). It cannot be said where, here, petitioner's attorney either did not recognize or refused to inquire into the entrapment defense, that the

petitioner had effective assistance (see also, *Summers v. United States,* 538 F. 2d 1208 [5th Cir. 1978] [remanded because the attorney did not attempt to explain the possibility of entrapment though the client asked him about it twice]). Accord, *Coles v. Peyton,* 389 F. 2d 224, 226 (4th Cir. 1968). "Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial." While it was true in *Coles* (*supra*), that counsel was an overworked public defender and had little time to investigate, such is not the case at bar. A strong doubt should have been raised before the First Circuit in the present case. Rather than preemptorily dismissing petitioner's claim, it should have remanded for further inquiry, as in *Coles.* See *Thomas v. Wyrick* (*supra*, at p. 414) (approving remand in *McQueen, supra*).

In *United States v. DeCoster,* 624 F. 2d 196 (D.C. Cir. 1976), the Court observed that a "duty to investigate is a subset of the overall duty of defense counsel" and that "a conscientious attorney will naturally investigate possible defenses" (*id.* p. 209). Further, it noted that failure to investigate "must be appraised in light of the information available to the attorney" (*id.*). In the case at bar, the basis of entrapment was readily apparent, the client was pressing the issue and the government's witness, Tirado, was readily available. Counsel failed in his duty and the First Circuit should have recognized it. In *Goodwin v. Balkom,* 684 F. 2d 794 (11th Cir. 1982), where counsel was unaware of the law and facts, the Court held, "counsel's ineffective assistance evidenced by his lack of through investigation deprived Goodwin of a pivotal defense."

The *DeCoster* Court also observed that an ineffectiveness claim must be evaluated in light of the strength of the government's case (*id.* p. 220). In *DeCoster, supra,* there were several witnesses, the victim gave a positive identification and the police, in hot pursuit, had the defendant in sight at all times. The evidence here is clearly not so overwhelming. The government has only one witness, whose testimony could have been rebutted by the petitioner. Further, there was only one small transaction, which appears more like an accommodation deal than a regular drug business, in over one year of surveillance. This is clearly a "meaningful demonstration that counsel's omission probably effected the outcome of the trial" (*id.* p. 211).

In *Washington v. Strickland,* 693 F. 2d 1243 (CA 5-Unit B), cert. granted 103 S. Ct. 2451 (1983), where it was alleged that counsel did not adequately prepare for a sentencing, the now Eleventh Circuit embarked on a through review of the question of ineffective assistance. Citing *United States v. Frady,* 456 U. S. 152, 170 (1982), it held that the defendant had to show that counsel's ineffectiveness "worked to his actual and substantial disadvantage." *Strickland,* (*supra,* p. 1258). Your petitioner disagrees with the Eleventh Circuit's reliance on *Frady, supra,* because the habeas corpus petitioner's complaint in *Frady* dealt with the trial Judge's instructions. As such, *Frady* more properly represents an outside interference case, where the government's intrusion is generally more apparent.

In reviewing the lower court in *Frady,* this Court was able to determine whether a trial was "infected with error so 'plain' the trial Judge and prosecutor were derelict in countenancing it, . . ." (*Frady,* p. 1592). Yet, in pure inef-

fective assistance cases, particularly where the preparation and investigation of the law and facts are in issue, the trial Judge is much less liable to know of the error. Further, one cannot reasonably expect a prosecutor to perfect his opponent's case. As Judge Freedman, of the Third Circuit, observed in *Moore v. United States,* 432 F. 2d 730 (3d Cir. 1970), "the exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case, failed to interview essential witnesses or to arrange for their attendance. Such omissions, of course, will rarely be visible on the surface of the trial, and to that extent, the impression of a trial judge regarding the skill and ability of counsel will be incomplete" (*id.* p. 739).

Here, counsel's failure not only prejudiced the outcome of trial but clearly prejudiced the sentencing. After noting that his defense was "transparent," the trial Judge, for fifty grams of cocaine, less than two ounces, sentenced the petitioner, a first-time offender, to ten years in prison, a $25,000 fine and eight years parole. Compare *United States v. Ramos,* 572 F. 2d 360 (2d Cir. 1978) (ten years sentence for Intent to Distribute Seventeen ounces of Heroin deemed harsh, remanded for resentence); *United States v. Carignan,* 600 F. 2d 762 (9th Cir. 1979) (eighteen-month sentence for Possession with Intent to Distribute Cocaine. Court noted average sentence for that type of crime was 4½ years); *United States v. Buege,* 578 F. 2d 187 (7th Cir.) cert. den. 439 U. S. 871 (1978) (eighteen-month sentence deemed fair for first offender); *United States v. Rabelo,* 596 F. 2d 868 (9th Cir. 1979) (four-year sentence with five years special parole. Affirmed where defendant imported 972 grams of cocaine).

Yet, even given this heavy burden of proof, it appears that this case would fit within the Eleventh Circuit's requirements. In *Washington v. Strickland, In Re Saunders,* 2 Cal. 3d 1033, 88 Cal. Rptr. 633, 472 P. 2d 921 (1970), is cited with approval. In *Saunders*, the defendant's attorney, though advised of a promising defense, chose to ignore it and never investigated it. The California Supreme Court, in overturning the conviction, as noted by the Eleventh Circuit, "found that a reasonable attorney would have recognized that diminished capacity was a very promising line of investigation in light of the information furnished to counsel . . . it also found that a reasonable attorney would not have made the strategic choice to rely upon the weak defense used to the exclusion of the diminished capacity defense" *Washington v. Strickland* (*supra*, p. 1256).

These are the facts and principles which squarely faced the First Circuit in the case at bar. Petitioner Pasarell's attorney pressed on with a "transparent" insanity defense even though he knew or must have known that entrapment was an available and promising defense. His decision, a fortiori, was made from either ignorance or neglect.

The First Circuit, in the case at bar, seemingly is blind to the facts of this case. Its application of the reasonably competent assistance standard is clearly in conflict with its sister circuits. As a result, the right to counsel in the First Circuit has all but dissipated.

3. The First Circuit countenanced prosecutorial misstatment and improper admission of evidence at trial depriving petitioner of his Sixth Amendment rights and requiring this Court's intervention.

Petitioner's sole defense on the merits in this case is insanity. The government was on notice of this from the

beginning of the trial. Yet, according to current standards of trial practice and pursuant to the long-standing, ingrained presumption on sanity, the defense still must first rebut this presumption before the prosecution will be required to prove sanity, as an element of the offense charged, beyond a reasonable doubt.

In this case, the government proceeded by introducing evidence from its informant, another D.E.A. Agent, and three (3) separate taped conversations between the petitioner and the government's informant. Curiously, the tape most crucial to the government's case, that which recorded the drug transaction, was not introduced at this time, although Tirado testified to the transaction and Aponte identified it.

The petitioner's case then went forward by way of testimony from petitioner's mother, his aunt, various business associates, and a treating psychologist. Each in turn related petitoner's long-standing and continuing mental instability in impairment, namely that he drank to excess, had been discharged from military service, and had business troubles immediately after his brother's death, some six (6) weeks before the drug purchase. Significantly, Dr. Garcia, the treating psychologist, testified that petitioner's long-standing illness had been exacerbated by his brother's death, a fact agreed to by the prosecution's expert when asked a parallel hypothetical (App. G at p. 40g).

The defense rested and moved for a dismissal of the charges, as it had done at the close of the prosecution's case-in-chief, on the grounds that the presumption of insanity had been rebutted and the prosecution had failed to prove sanity beyond a reasonable doubt. The motion was again denied and the prosecution was allowed to reopen its

case-in-chief for the express purpose of rebutting the evidence of insanity.

It is petitioner's position that proof presented on the government's reopening of its case-in-chief, essentially on one narrow issue, should not have been admitted, and that the government in its summation closely and knowingly misstated the evidence, without curative instruction from the Court despite defense counsel's request, such that petitioner was unfairly prejudiced.

The A.U.S.A., in his summation twice stated that Dr. de Thomas, the government's expert medical witness, had found that the petitioner had the capacity to distinguish right from wrong or to conform his actions to the dictates of the law and was sane at the time of the drug deal (App. G at p. 43g). Examination of the record reveals that the Doctor said no such thing. Rather, the Doctor, in terms exceedingly equivocal and phrased in the contrapositive, stated that he had no such evidence at all (App. G at pp. 37g-39g). Furthermore, it should be noted that Dr. de Thomas saw petitioner only once and solely for the purpose of determining whether he was competent to stand trial. His opinion as to petitioner's sanity on December 24, 1981, was based on this one eighteen (18) minute interview and, thereafter, a conversation with another physician who had examined petitioner, a conversation with Tirado, review of medical records and hearing the government's audio tapes (App. G at p. 36g).

In his direct examination of Dr. de Thomas, the A.U.S.A. was nearly able to paraphrase the Doctor's position. Yet, in summation, he completely skewed the evidence. The effect of this misstatement is obvious. The A.U.S.A., charged with the enforcement of our laws and

It becomes apparent that the Court had made up its mind quite early in the trial that petitioner was sane and so stated at the close of the prosecution's case on the merits. Thinking the petitioner sane, the Court preempted constitutionally fair jury deliberations by allowing these statements in and by failing to give curative instructions. The Court assumed petitioner sane, assumed the jury would do so and, therefore, found nothing even untoward in the prosecutor's misphrasing of the testimony by the government's witness regarding the issue of sanity. Under these circumstances, the substantial nature of the prejudice which resulted from the Court's omission warrants a reversal of petitioner's conviction. See *United States v. Newman,* 490 F. 2d 139 (3d Cir. 1974).

There was ample evidence of petitioner's insanity. The government had little or nothing to indicate the contrary. The government's expert said as much. "I have no protection of our rights and liberties, speaks with the authority of the government. By virtue of his position, his statements carry great weight and persuasiveness. Here, de Jesus clearly stated, after improperly suggesting that petitioner was responsible for the drug addictions of the inmates in a local half-way house, that petitioner was sane. Trial counsel objected by pointing out the error. de Jesus, nevertheless, immediately went on to again proclaim that same misstatement—that Dr. de Thomas had found petitioner sane—without any intervention by the Trial Court, which moments before had intervened to prevent further reference to the half-way house (App. G at p. 43g). This deliberate misstatement by the government was unfairly prejudicial to the petitioner and the failure of the Court to give a curative instruction is, at least, reversible error. *United States v. Morris,* 568 F. 2d 396, 402 (5th Cir. 1978).

evidence to say that he [petitioner] was aware between right and wrong" (App. G at p. 39g). Tirado testified that petitioner drank as much as ever, which was a considerable amount, according to petitioner's mother and aunt (App. G at pp. 17g-18g). Based on these equivocations, the government's emphatic double misstatement of expert testimony was, without doubt, harmful and critical in the jury's decision to return a verdict of guilty.

In addition, the Court improperly admitted government rebuttal evidence. The government introduced a weapons permit application with supporting documents made by petitioner some two (2) years earlier. The combination of the weapons application with the drug transaction was inflammatory. *United States v. Green,* 648 F. 2d 587 (9th Cir. 1981).

One document contained within this application related statements regarding petitioner's mental health given by Benitez to a police investigator to the effect that petitioner had not suffered any mental illness and thereby conflicted with Benitez's testimony. This statement called for an opinion from Benitez which he was not qualified to give. He is not a physician. If this evidence was offered to impeach his credibility, no proper foundation was laid. Benitez was never directly presented with the contradictory answers he gave (although he was shown the form on which his answers appeared). This was improper impeachment. *United States v. Morgan,* 115 U. S. 69 (1885). He should have been given the opportunity to explain his prior statement. He was not. Furthermore, as Benitez was not allowed to give his opinion on direct examination regarding petitioner's mental health, his opinion should not have been admitted in rebuttal. The prosecution used a subterfuge to place this prior, unsworn statement before

the jury as substantive evidence of petitioner's sanity. This the prosecution may not do. *Bridges v. Wixon,* 326 U. S. 135 (1945). On a secondary level, the possibility of jury confusion regarding the limited use of this testimony should have been apparent to the Court. Where the jury may not be able to properly consider a limited admission of testimony and where prejudice is likely to result, such evidence should not be admitted at all. *Shepherd v. United States,* 290 U. S. 96, 102-106 (1933). But, in the last analysis, the fundamentally unfair nature of impeachment by reference to this weapons permit should have been apparent to the Court and should have prevented it being mentioned at trial. *United States v. Warledo,* 557 F. 2d 721 (10th Cir. 1977).

Trial counsel failed to object to the introduction of this evidence. This is not fatal to petitioner's argument, as the errors at trial were obvious and fundamentally affected the fairness of the proceedings. *United States v. Atkinson,* 297 U. S. 157, 159-160 (1936). In substance, then, the petitioner argues that these errors at trial, the introduction of unfairly prejudicial evidence, the inflammatory misstatements by the prosecution in its summation regarding its expert's opinion of petitioner's sanity, and the Court's failure to deliver a curative instruction on this point deprived the petitioner of his Sixth Amendment right to a fair trial. For the Court of Appeals decision to stand, it must be apparent that these errors were harmless beyond a reasonable doubt. *Chapman v. California,* 386 U. S. 18 (1967). It cannot in all fairness be said that such is the case.

Conclusion.

Due to the conflict in views regarding the determination of effective assistance of counsel, there is no equal enjoyment of that right among the Circuits. Further, in denying the petitioner's claim as outlined above, the First Circuit is at variance with this Court's pronouncements in *McMann, supra.* Its reasonably competent assistance test as applied vitiates the right to counsel. Furthermore, given these errors and the additional errors at trial, as outlined above, the petitioner was denied his right to a fair trial under the totality of circumstances. Therefore, this petition for a writ of certiorari should be granted.

Respectfully submitted,

DAVID COHEN, P.C.
Attorney for Petitioner
200 North Main Street
P.O. Box 70
Liberty, NY 12754
(914) 292-8020

APPENDIX A.

Opinion of the United States Court of Appeals for the First Circuit.

UNITED STATES COURT OF APPEALS,

FOR THE FIRST CIRCUIT.

UNITED STATES OF AMERICA,

Appellee,

v.

MANUEL LECAROZ PASARELL,

Defendant, Appellant.

No. 83-1410

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Gilberto Gierbolini, *U.S. District Judge*]

Before:

Coffin and Breyer, *Circuit Judges,* and Maletz,* *Senior Judge.*

John S. McBride, with whom *David Cohen, P.C.* was on brief, for appellant.

Everett M. de Jesus, Assistant United States Attorney, with whom *Daniel Lopez Romo,* United States Attorney, was on brief, for appellee.

February 8, 1984

COFFIN, *Circuit Judge.* Appellant Manuel Lecaroz Pasarell was tried by a jury in the United States District Court for the District of Puerto Rico on a charge that on December 24, 1981, he had sold approximately fifty grams of cocaine to one Pedro Tirado. Although Tirado was appellant's second cousin, he proved to be, like Hamlet's uncle, "A little more than kin, and less than kind". He was, in fact, a government informer with a tape recorder in his boot. The jury convicted appellant of selling cocaine in violation of 21 U.S.C. §841(a) (1). The court sentenced him to ten years' imprisonment and a $25,000 fine; it released him on $200,000 bail pending this appeal. Appellant raises a number of issues on appeal, ranging from challenges to trial procedures to objections to his bail conditions and the severity of his sentence. We disagree with his arguments and affirm the judgment of the district court.

We address first appellant's argument that his conviction should be reversed because the prosecution failed to introduce sufficient evidence to justify the jury in concluding that his insanity defense had been rebutted. Appellant produced several lay witnesses who testified to his

*Of the United States Court of International Trade, sitting by designation.

erratic behavior in the years preceding the cocaine sale. He also produced a psychologist, Dr. Garcia, who testified that he had examined appellant on a number of occasions beginning in July 1982 and who offered the opinion that appellant had suffered from a depressive psychosis since 1968. The prosecution produced a psychiatrist, Dr. deThomas, who had performed a court-ordered competency examination on the appellant in July 1982. When asked his opinion of appellant's mental condition at the time of the crime, Dr. deThomas stated, "I don't have evidence to give an opinion in terms of what mental condition he had at such date but in view of my evaluation and other facts that I have received, I don't have evidence to sustain that he was psychotic at that time".

When a defendant introduces evidence of insanity, the prosecution has the burden of proving him sane. *Amador Beltran v. United States,* 302 F.2d 48, 52 (1st Cir. 1962). In *United States v. Dube,* 520 F.2d 250 (1st Cir. 1975), this court described the prosecution's burden in these terms:

> "Insanity is a jury question unless a reasonable man viewing the facts and reasonable inferences therefrom in the light most favorable to the prosecution must necessarily possess a reasonable doubt as to the defendant's sanity. The nature and quantum of rebuttal evidence sufficient to present a jury question is to some extent determined by the strength of the case for insanity. There is no general principle that the prosecution must counter defendant's expert medical evidence with expert testimony of its own. The expert testimony is not conclusive even where uncontradicted; its weight and credibility are for the jury to determine . . . ." *Id.* at 251-52 (citations omitted).

The evidence in this case was not convincing enough to compel a reasonable juror to doubt appellant's sanity. Appellant's expert attempted to reconstruct, by means of tests, interviews with appellant, and a behavioral history supplied by appellant's family and acquaintances, appellant's state of mind some seven months earlier. Although he concluded that "when [the appellant] is in the middle of a crisis he shows a very progressive ability to distort his own reality", he also observed that the appellant "can function all right, when he is in the remission of symptoms", and that such a remission could last for months or even years. On cross-examination he admitted that a psychotic person might be able to distinguish right from wrong, "specially when [he is] under remission of symptoms". He offered no testimony on defendant's state of mind or his ability to conform his behavior to the requirements of the law on the day of the crime.

The prosecution's psychiatrist, who interviewed the appellant and considered his psychiatric history, concluded that this evidence was insufficient to establish that appellant had been psychotic at the time of the crime. In addition to this expert testimony, the jury heard the testimony of Tirado, the government informer, who contradicted the defense's theory that the death of appellant's brother a month before the transaction had triggered a psychotic episode. Tirado stated that the appellant "was sad [owing to his brother's death] but at all times he was conscious of what was being done" and that he was not drinking any more than usual. Finally, the jury heard a tape recording of the appellant's cocaine transaction, in which his tone of voice and the nature of his remarks provided some evidence that he was rational, alert, and aware that he was committing a crime. The prosecution's evidence was sufficient to rebut the defense's relatively weak evidence of insanity and to support the jury's conclusion that appellant was sane on the date of the crime.

Appellant argues that the court erred in allowing the government to reopen its case in chief to present evidence that went beyond its avowed purpose, to rebut the insanity defense. Appellant contends that the testimony of several witnesses called after the government had reopened its case "was merely cumulative and served to bolster previous government testimony as to the actual transaction". If the evidence of the transaction *was* cumulative, we fail to see how it prejudiced appellant, since it only confirmed what he had already admitted: that he sold cocaine to Tirado. To the extent this additional testimony tended to show that appellant was sane when the transaction occurred, it prejudiced his insanity defense; but this was the purpose for which it was properly admitted. *See generally United States v. Manetta,* 551 F.2d 1352 (5th Cir. 1977) (describing the evidence admissible when the government reopens its case in chief to respond to an insanity defense).

Appellant also argues that the government played the tape recording of the transaction at this point in the trial without first causing it to be admitted into evidence. The record contradicts this assertion. The government asked its expert to identify the tape and then moved to have the tape admitted as Exhibit 4. The court called for *voir dire,* and appellant's attorney stated that he waived *voir dire* but that he had earlier raised an objection to the evidence. The court noted that it had already overruled this objection, and asked if counsel had any further objection. Counsel indicated that he did not. A short time later the court gave the government permission to play the tape, cautioning the jury that the transcript of the recorded conversation was not in evidence but affirming that the tape itself was in evidence.

Appellant contends that the court committed reversible error in failing to give a curative instruction to the jury after the prosecutor misstated Dr. deThomas's psychiatric

testimony, and that the prosecutorial misstatement was so damaging as to deny appellant his right to a fair trial. Dr. deThomas testified, "I don't have evidence to sustain that [Lecaroz] was not aware between right and wrong at the time of the commission of the offense". In his closing argument, the prosecutor transformed this negative statement into a positive one, stating that Dr. deThomas "was convinced that [Lecaroz] at the time of December 24, 1984 [*sic*], did have a substantial capacity". Appellant's attorney interrupted him with the observation "That is not correct", and the prosecutor repeated his positive statement of Dr. deThomas's testimony. At the request of appellant's attorney, the court prepared a curative instruction informing the jury that it was their recollection of Dr. deThomas's testimony that controlled "and not what the United States Attorney says". The court decided not to deliver this instruction because it believed that the jury had already been told, both in the court's regular instructions and in the prosecutor's closing argument, that they were not to consider the prosecutor's remarks as evidence.

We disagree with the government's argument that the prosecutor's characterization of Dr. deThomas's testimony fell within the permissible limits of prosecutorial zeal: there is a substantial difference between the statement "I don't know that defendant was not sane" and the statement "I know that defendant was sane". The prosecutor would have better fulfilled his obligations had he admitted his error and done his best to see that it was corrected, rather than stubbornly insisting that his version of the testimony was correct and opposing the defense's motion for a curative instruction. We agree with the trial court, however, that the proposed curative instruction would have added little to the instructions that the jury had already heard. The prosecutor began his summation by informing the jury, "What I am telling you now is not

evidence''; and the court, in its regular instructions, told the jurors that they were to consider only the evidence before them and cautioned them to remember that ''any statements, objections or arguments made by the lawyers are not evidence in the case . . . . [I]t is your own recollection and the interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you''. Because the proposed curative instruction merely repeated this information, the court's refusal to give the instruction was not reversible error.

It remains for us to determine whether the prosecutorial misstatement so infected the proceedings that it requires us to remand the case for a new trial. When a prosecutor ''misstates facts . . . in such a way as to prejudice a defendant, a new trial is required''. *United States v. Newman,* 490 F.2d 139, 147 (3d Cir. 1974); *See also King v. United States,* 372 F.2d 383 (D.C. Cir. 1967).

We do not believe that the prosecutorial misstatement in this case resulted in sufficient prejudice to constitute reversible error. First, we note that Dr. deThomas uttered the disputed phrase (or phrases very similar to it) three times during the course of his testimony, in response to the prosecutor's repeated question about defendant's mental condition at the time of the crime. Dr. deThomas first testified, ''I don't have evidence to sustain that he was psychotic at that time''; a short time later he said, ''I don't have evidence to sustain that he was not aware between right and wrong at the time of the commission of the offense''; and when the prosecutor pressed him to phrase the question in the positive rather than in the negative, he said, ''I have no evidence to say that he was not aware between right and wrong''. Second, we note that the prosecutor himself, at an earlier point in his closing remarks, correctly summarized the psychiatrist's testimony: he stated that Dr. deThomas had examined the facts before

him and had found "that there was no evidence to show that [Lecaroz] did not know what he was doing that day on December 24, 1981 . . . ." Third, the defense's summation dwelt at some length on the weakness of Dr. deThomas's testimony, stressing to the jury that the testimony had been given in the negative:

> "You know what was [Dr. deThomas's] conclusion . . .? 'I don't have evidence that shows that the defendant was insane'; that means, 'I don't have evidence to show that he is sane either' and the burden of proof is on the government . . . .
>
> "He has to prove [sanity] beyond a reasonable doubt. That expert who really knows, allegedly, the most that he can say is that he has no evidence that this boy was insane on December 24.
>
> . . . .
>
> ". . . Dr. deThomas who is supposed to be an expert and he almost always testifies on behalf of the government and he heard the tapes and the most that he could tell you was that he had no evidence that [Lecaroz] is insane."

This is not a case such as that in *United States v. Newman,* 490 F.2d 139 (3d Cir. 1974), where the prosecutor's misstatement combined with a number of other procedural errors to compromise defendant's right to a fair trial; nor is it like *King v. United States,* 372 F.2d 383 (D. C. Cir. 1967), where the prosecutor repeatedly made an assertion not supported by the evidence. Here we have a single prosecutorial miscasting of testimony in a positive form, immediately called to the attention of the jury by defense counsel's remark "That is not correct", and

counter-balanced by at least seven reiterations of the testimony in its negative form. In addition, we have jurors properly instructed "that closing arguments are not evidence and that the jury's recollections control", *United States v. Flaherty,* 668 F.2d 566, 595 (1st Cir. 1981). It seems to us highly unlikely that the single misstatement by the prosecutor could have caused the jury to misremember Dr. deThomas's testimony. Viewing the record as a whole, we find that appellant received a fair trial.

Appellant argues that he received ineffective assistance from his chosen counsel during his trial. As evidence that this assertion is correct, appellant points to a number of allegedly erroneous decisions made by his attorney. For example, appellant points out that his attorney refused to employ an entrapment defense, contrary to appellant's wishes; that he refused to allow appellant to testify; and that he failed to request a charge to the jury that they were to draw no inferences from appellant's failure to testify.

An attorney has the duty to render "reasonably competent assistance" to his client. *United States v. Bosch,* 584 F.2d 1113 (1st Cir. 1978). The appellate court will not use the benefit of hindsight to second-guess tactical decisions made by the attorney unless they are unreasonable. *United States v. Ortiz Oliveras,* 717 F.2d 1 (1st Cir. 1983). The record in this case reveals that the entrapment defense was unlikely to succeed; neither the decision to use a different defense nor the other decisions of which appellant complains were "outside the range of competence expected of attorneys in criminal cases". *Id.* at 5. To the contrary, the record shows that appellant's counsel vigorously and competently represented him throughout the trial. If appellant disagreed with the trial strategy of his chosen counsel, his remedy was to find a different lawyer before trial had begun, not to complain of his lack of success once trial was over.

Appellant argues that the ten-year sentence and $25,000 fine imposed by the trial court were so excessive as to constitute an abuse of discretion. Appellant was convicted under 21 U.S.C. § 841, which provides in subsection (1)(A) that violators "shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both". The trial judge has broad discretion in pronouncing criminal sentences, and a sentence within the statutory limits is not ordinarily subject to review. *United States v. Foss,* 501 F.2d 522 (1st Cir. 1974). A court of appeals will, however, review the process by which the sentence is imposed and vacate if it finds that the trial judge has relied on "mechanical sentencing that steadfastly ignores individual differences". *Id.* at 527; *see also United States v. Wardlaw,* 576 F.2d 932 (1st Cir. 1978). Appellant argues that the trial court based its sentence on impermissible considerations because it failed to consider that appellant was "a first offender with an otherwise unblemished record and exemplary background" and because its sentence reflected a "thinly veiled distaste for the relatively monied defendant".

The record provides no support for the appellant's claim that the trial judge felt personal animosity toward him, and it provides ample support for the ten-year sentence. At the sentencing hearing, the court indicated that it had read the probation officer's presentence report "very, very, very carefully". It heard evidence from the prosecutor that the cocaine appellant had sold was of an unusual purity, indicating that appellant "had the ability to obtain cocaine straight from the source and is basically way up in the pyramid of the cocaine distribution scheme". The tape of the transaction had also indicated that appellant had access to additional cocaine and to large quantities of marijuana. On the basis of this evidence, the prosecutor recommended a twelve-year sentence.

At the conclusion of the prosecution's presentation, the court heard additional argument by appellant's counsel. The court remarked that "this is the type of case in which a Court has to give a lot of thought". It observed that appellant could not claim that need had forced him into a life of crime, since both he and his family were wealthy. It stated that the probation officer's references to appellant's mental state tended "to adopt the theory of the defense that was not believed by the jury; that . . . was not believed by me". Nowhere in this record is there an indication that the trial court failed to take appellant's individual case into consideration, or that it abused its discretion in imposing the sentence.

As to appellant's other assignments of error, we note that we have reviewed them and find them to be without merit.

The judgment of the district court is affirmed.

APPENDIX B.

Order of the Circuit Court Denying Reargument.

UNITED STATES COURT OF APPEALS,

FOR THE FIRST CIRCUIT.

UNITED STATES OF AMERICA,

Appellee,

v.

MANUEL LECAROZ-PASARELL,

Defendant, Appellant.

No. 83-1410

Before Coffin and Breyer, *Circuit Judges,* and Maletz, *Senior Judge.*

ORDER OF COURT

Entered: March 26, 1984

Upon consideration of appellant's petition for rehearing,

It is ordered that said petition for rehearing be, and the same hereby is, denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

[cc: Messrs. Cohen, McBride and DeJesus.]

APPENDIX C.

Order of the Circuit Court Making Petitioner's Pre-Conference Report Part of the Record on Appeal.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 83-1410.

UNITED STATES OF AMERICA,

Appellee,

v.

MANUEL LECAROZ-PASARELL,

Defendant-Appellant.

ORDER OF COURT

Entered September 7, 1983

No opposition having been presented, the motion to have the pre-sentence investigation report made a part of the record in this case is granted.

By the Court:

FRANCIS P. SCIGLIANO
Clerk

[Messrs. Cohen and DeJesus.]

APPENDIX D.

Order of the United States District Court for the District of Puerto Rico Granting Counsel's Motion to Inspect Petitioner's Pre-Sentence Report and Denying That it be Made Part of the Record on Appeal.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA

vs.

MANUEL LECAROZ PASARELL

CR. NO. 82-97

ORDER

Defendant's counsel has filed two motions requesting permission to inspect United States Probation Office Presentence Report and to have the presentence report of defendant made part of the record on appeal.

The presentence report will be available to be examined by counsel for defendant at the United States Probation Office.

Defendant was convicted of the crime of distributing approximately 50.0 grams (net weight) of almost pure cocaine with a street value of $20,000 in violation of Title 21 United States Code, Section 841(a)(1), which carries a term of imprisonment of no more than fifteen years, a fine of no more than $25,000, or both. The statute also provides for the imposition of a special parole term of at least three years in addition to such term of imprisonment.

Defendant was sentenced to ten years of imprisonment, a fine of $25,000, and a special parole term of eight years. As it is clearly shown, the sentence imposed is within the limits specified for violation of the statute concerned.

Therefore, in view of the above, the request that the presentence report be made part of the record on appeal is hereby denied.

SO ORDERED.

San Juan, Puerto Rico, this 5th day of August, 1983.

GILBERTO GIERBOLINI
U.S. District Judge

s/co to

U.S. Atty.
Joaquin Monserration
Probation Office
8-8-83
LCO

APPENDIX E.

Order of the District Court Pursuant to §4244, Title 18 U.S.C. That Petitioner Undergo a Mental Examination.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA

Plaintiff,

v

MANUEL LECAROZ PASARELL

Defendant

CRIMINAL NO. 82-0097

ORDER

Upon motion made by Joaquin Monserrate Matienzo, Esq., of counsel for defendant, in which it is requested that a mental examination be performed upon defendant Manuel Lecaroz Pasarell, the court

HEREBY ORDERS that pursuant to the provisions of Section 4244, Title 18, United States Code, a mental examination of the defendant be performed.

The United States Attorney's Office shall make necessary arrangements to have the defendant examined by Antonio de Thomas, M. D. at the Hato Rey Psychiatric Hospital, Hato Rey, Puerto Rico on July 15, 1982, at 3:00 p.m., and as many times as said psychiatrist deems it necessary, in order to determine whether the defendant is presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense.

Dr. Antonio de Thomas shall report in writing to the court the results of said mental examination, furnishing copies of said results to the court and the parties involved.

IN VIEW OF THE ABOVE, the final status conference and trial of this case scheduled for July 9, 1982 and August 25, 1982, respectively, are hereby vacated and set aside.

SO ORDERED.

San Juan, Puerto Rico, this 8th day of July, 1982.

GILBERTO GIERBOLINI
United States District Judge

APPENDIX F.

Order of the District Court Specifying Methods and Conditions of Release.

Bail Reform Act Form No. 2

UNITED STATES DISTRICT COURT

JUDICIAL DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA

v.

MANUEL LECAROZ-PASSARELL

Defendant

Case No. Criminal 82-97

Part I.—Preferred Methods of Release

It is hereby ORDERED that the above-named defendant be released, provided

Personal
Recognizance
(x) that he promises to appear at all scheduled hearings as required.

Part II.—Conditions of Release

Upon finding that release by one of the above methods will not by itself reasonably assure the appearance of the defendant, it is hereby FURTHER ORDERED that the defendant be released on the condition(s) checked below:

Third Party Custody

( )(1) The defendant is placed in the custody of

Restrictions on Travel, Association or Place of Abode

( ) (2) The defendant will comply with each of the following conditions: A—Will not leave the jurisdiction of this Court without prior written permission. B—Will not enter the premises of any airport or pier. C—Will maintain his place of abode at the address indicated in Part IV of this form. D—To report to the U.S. Marshal's office two times per week.

10% Deposit

( ) (3) The defendant will execute a bond* binding himself to pay to the United States the sum of ____ dollars ($) and will deposit in the registry of the court the sum of _____ dollars ($), in _____, being not more than 10% of the amount of the bond, such deposit to be returned upon the court's determination that the defendant has performed the conditions of his release.

Cash or Surety Bond

(x) (4) The defendant will execute a bond* in the amount of One Hundred and Fifty Thousand dollars ($150,000.),

either secured by the undertakings of sufficient solvent sureties or by the deposit of an equal amount of cash or other security in lieu thereof, as follows: $25,000. in cash prior to his release and $125,000.00 in sureties on or before June 30, 1982.

*This form is not a bond and does not create in the defendant or surety a binding financial obligation to the United States. The execution of an Appearance Bond (Cr. Form No. 17) is necessary in order for such an obligation to attach.

Part-time
Release

( ) (5) (a) The defendant will be released from _____ to _____ on condition that he return to custody at the specified time at such place of confinement as the United States Marshal shall designate.

Other
Conditions

(x) (5) (b) The defendant agrees that he will comply with the following other conditions of release: A—To turn in any passport, if any.

Part III.—Appearance and Penalties.

Appearance

It is hereby FURTHER ORDERED that the defendant shall appear next at P.O. in Courthouse Bldg.—Room 602 June 23, 1982—9:30 A.M. Old San Juan, P.R., (ARRAIGNMENT) and at such other places and times as the United States Magistrate or Court may order or direct.

Penalties

If the defendant violates any condition of his release, a warrant for his arrest will issue immediately. After arrest, the terms and conditions of any further release will be redetermined.

If the defendant fails to appear before any court or judicial officer as required, an additional criminal case may be instituted against him. If the failure to appear is in connection with a charge of felony, or while awaiting sentence, or pending appeal or certiorari after conviction, the penalty is a fine of not more than $5,000 or imprisonment for not more than five years, or both; if he fails to appear after being released on a misdemeanor charge, the penalty is a fine of not more than the maximum provided for the misdemeanor or imprisonment for not more than one year, or both.

Part IV.—Acknowledgment by Defendant

Acknowledgment

I MANUEL LECAROZ PASSARELL understand the methods and conditions of my release which have been checked above and the penalties and forfeitures applicable in the event I violate any condition or fail to appear as required.

I agree to comply fully with each of the obligations imposed on my release and to notify the Magistrate or Court promptly in the event I change the address indicated below.

MANUEL LECAROZ PASSARELL
Defendant
Jardin St. A-1, Urb. Garden Hills
Guaynabo, P. R. 782-4189

(Illegible)
United States Magistrate

RELEASE ORDERED:

Date: June 17, 1982

APPENDIX G.

Excerpts From Transcript.

PEDRO TIRADO.

(85) Q. How long have you known him? A. Well, I have known him for several years since he is part of my family and I have known him in full, intimately for a year, a year and a half.

Q. What if any is your relationship to him in terms of family ties? A. Yes, he is my second cousin.

Q. Have you eve worked for him? A. Yes.

Q. When was that? A. The summer of '81, from April until the end of July of 1981.

Q. In what capacity was it that you worked for him? A. I was like a personal secretary. I was in charge of paying the rent and preparing the documents and also when he brought concerts I was in charge of seeing that the musicians and the people coming with the concerts had everything they needed. If they needed a place to stay, we would get it for them.

Q. Was that the extent of your duties? A. More or less, yes.

Q. What if any sort of business did your work involve? (86) A. I don't understand the question.

Q. Do you know what sort of business it was that Mr. Lecaroz was involved for which you then worked for? A. Yes, he was a member of the board of directors of Radio Rock. He was the treasurer. He was also co-owner of the Casa Blanca Restaurant.

The Court: Hold it, you said he was a member of the board of directors for Radio Rock, is that correct?

The Witness: Yes, Your Honor.

The Court: And then owner of what?

The Witness: Co-owner of the Casa Blanca Restaurant.

The Court: Where is that?

The Witness: Avenida Magdalena in the Condado, in front of the Burger King in the Condado.

The Court: Go ahead.

By Mr. de Jesus:

Q. Was he involved in any other businesses that you know of? A. Yes, he also brought in concerts and he had dealings with Fania Records and RGR Records.

Q. What kind of concerts are you referring to? A. Yes, he brought rock and roll concerts and that type of concerts.

Q. How often would you see Mr. Lecaroz during that (87) period between April 1981 and July 1981? A. During that period of time I would say I saw him daily.

Q. Where were you residing during that period of time? A. Yes, I was living at Manolin's apartment since I had moved there for his convenience.

Q. When you mentioned for his convenience, what do you mean by that? A. Well, if he needed that his car be given—or whatever he needed from me, it was easier if I was there to help him out than if I had to go from my house to his place and besides that I had no means of transportation.

Q. How often would you see him during the period between August, 1981 and January 1982? A. During that period of time I did not see him too frequently because he was in New York but when he was in Puerto Rico I saw him for sure.

Q. You mentioned that he spent time in New York. Do you know if he had any business dealings in New York?

A. Well, he had dealings with Fania and also some times he was with a modeling agency so he spent a great deal of time in New York taking care of business.

The Court: What is Fania?

The Witness: It is a company that is in (88) charge of promoting and recording latin music. It is the largest latin music recording and promotion company.

The Court: Salsa?

The Witness: Salsa.

By Mr. de Jesus:

Q. How is it that you know about Mr. Lecaroz' dealings in New York? A. Well, I got in touch with him by phone over there and whenever I had to get in touch with him it was through Fania and I also went to visit him during the summer and I stayed with him over there so I had the opportunity of seeing how he worked in the business.

Q. What time was it or when was it that you spent some time in New York? A. I don't remember exactly the date but I do know it was in July because I spent my birthday in New York.

Q. What day were you born? A. July 16.

Q. Did there ever come a time that you met with agents from the Drug Enforcement Administration during the year 1981? A. Yes.

Q. How did this meeting come about?

Mr. Monserrate: Your Honor, may we approach the Bench?

* * *

(91) The Witness: The end of July, the beginning of August.

By Mr. de Jesus:

Q. What if anything occurred as a result of your meeting with this Sergeant Alvarado? A. Sergeant Alvarado called me at my house—

Mr. Monserrate: Objection.

The Court: You will not repeat or say what Sergeant Alvarado told you.

The Witness: He called at my house and we agreed on having a meeting the following day.

By Mr. de Jesus:

Q. Did you in fact meet with him? A. Yes, sir.

Q. Was anybody else present at that meeting? A. Yes, a person who identified himself as a narcotics agent and he asked me several questions.

Q. As a result of that meeting that you had that day with Sergeant Alvarado and the person that identified himself as a narcotic agent, what if anything happened next? A. Yes, we agreed meeting again so that his supervisor could ask me some questions that he wanted to ask.

Q. Whose supervisor? A. Of the narcotics agent.

Q. Did there ever come a time when you met with the (92) narcotics agent's supervisor? A. Yes, Special Agent Felix Jimenez and I met later on and several questions were asked.

Q. Do you know for whom Mr. Felix Jimenez works? A. Yes, he informed me that he worked for the Drug Enforcement Administration and the task force.

Q. Do you know what this task force is? A. Yes, it is a joint work between the Police of Puerto Rico and federal agents to fight narcotics traffic in Puerto Rico.

Q. Without going into the contents as to the specific questions as to you, what occurred in that meeting that you had with Mr. Felix Jimenez?

Mr. Monserrate: It is too general a question, Your Honor.

The Court: Overruled.

The Witness: After talking to Special Agent Jimenez, I offered to work for them and cooperate with them.

Q. Cooperate in what sense? What do you mean, cooperate? A. That if I had any information regarding drug traffic I would inform them.

Q. Were you offered any pay for your work? A. No.

Q. Did you ever receieve any monies in relation to the (93) work that you performed? A. Yes, I was reimbursed for any expenses incurred by me.

Q. How much money were you reimbursed? A. In this particular case around 8 hundred dollars.

Q. From whom did you receive those monies? A. Sometimes from Agent Jimenez, sometimes from Agent Castillo and sometimes from Agent Aponte.

Q. Did you receive any other type of compensation of any kind in relation to your work in this particular case? A. The only thing, this suit had to be bought for me because it would be bad if I came in uniform.

Q. What do you mean, it would be bad?

Mr. Monserrate: Your Honor, I object.

The Court: Sustained.

By Mr. de Jesus:

Q. Was there any reason why, do you know of any reason why that suit had to be bought for you?

Mr. Monserrate: Objection, Your Honor, same thing.

The Court: no, it is not the same thing this time. Overruled.

The Witness: Yes, because I do not come here to testify in my official position but as a civilian witness.

By Mr. de Jesus:

* * *

(96) Q. What if you know was he doing during that time? A. Well, he was busy taking care of his brother's business, the one who had died and also they had just bought a small theatre that they were going to remodel to make it a recording studio and he was in charge of coordinating with the engineer as to the remodeling of the theatre.

Q. Do you recall seeing Mr. Lecaroz during the month of December, 1981? A. Yes, on December 22 I saw him at Casa Blanca, the restaurant. There was a—

Q. What if anything occurred on that day? A. Yes, there was a party at the restaurant, the restaurant's Christmas party and he was there with me and I spent the day with him and after leaving the restaurant he asked me whether I wanted to accompany him to Mendez and Company.

We went to Mendez and Company and he was explaining to me how the business in Mendez worked. He showed me the place and then he bought some liquor which was for his Christmas gifts. We left Mendez. It was already dark and then in the car on our way back to the restaurant I told him that I had had a bad business where I had bought two ounces of cocaine and the material was very

bad and I had lost 2 thousand dollars I had invested in it and that it was a pity because if it had been good I would have bought even 2 (97) eighths of a kilo and then he offered me, he told me that he had very good material; that no one, no one in Puerto Rico had it and that he could sell me the one eight of a kilo I wanted and I asked him what price would he sell it for and he told me about 97 hundred dollars and I told him that I needed at least one day to get the money and I asked him whether he had the material, the cocaine available and he told me that if I had the money at that time he could give it to me at that time.

I told him that I would call him later on to see whether I had gotten the money and then he took me to the restaurant and I went home.

Q. How were you going to pay, how did you propose to pay the eight of a kilogram? A. I told him that I would see whether between some friends of mine and myself we could get the money together and then that if I was able to get the money I would buy it from him.

Q. You stated that you were taken back to the restaurant and from the restaurant you went home. Did you do anything else that evening? A. Not that I remember.

Q. On the following day, the 23rd of December, 1981, what if anything occurred on that date? A. Yes, I met with special Agent Felix Jimenez,

* * *

(99) By Mr. de Jesus:

Q. What instructions if any did you receive as a result of your consultations with the Special Agent?

Mr. Monserrate: Objection. He is asking for a hearsay statement.

The Court: Overruled.

The Witness: I received instructions.

Mr. Monserrate: Objection.

The Court: This is not hearsay. This is not offered for the proof of the matter. It is just that certain instructions were given. Whether those instructions are the truth or not, that is not the point at this time so it is not hearsay. Overruled.

The Witness: I Was given instructions that instead of buying one eighths of a kilogram at that time, we would rather buy—I would rather buy two ounces.

At that time two ounces were to be bought and then sometime afterwards another two ounces were to be bought.

Mr. de Jesus:

Q. Do you know if there was any reason why this instruction was given to you? A. Yes, according to the instructions at that time all we had available for purchase was $4,000 and it was not going to be possible for them to get the 19 thousand—that is the $9,500.

(104) Q. How was the device placed on you? A. Agent Victor Aponte installed the transmitter in the back pants pockets, the antenna on my back. It was taped with adhesive tape and the microphone in the front, in my chest also with adhesive tape.

Q. Once the Kell unit was installed and the search of your person and the vehicle was performed, what if anything did you proceed to do? A. Yes, I moved with the surveillance team to the Park Boulevard Condominium which is where Manolin resided. Agent Victor Aponte activated the unit and I went up to Manolin's apartment.

Q. What if anything occurred then at the apartment? A. When I got there I knocked on the door and I was received by Orlando who was Manolin's housekeeper and then he told me that Manolin was in the bedroom. I went up to Manolin's bedroom. Manolin was asleep. I woke him up. I told him that I had the money. I showed it to him and I told him if he wanted to give me the material I would take it and then Manolin told me that he didn't have the material immediately there with him; that it had to be brought to him from Miami and that I should leave the money; that I should leave the money and then when his friend would come from Miami he would call me; that I call him or that I should call

* * *

(109) and then he got out from a small bottle identified as talcum powder, it was a metal can. He removed the upper part and from it he took out a white powder which had some rocks inside, small stones.

Q. What do you mean by rocks or stones? A. The same powder. It was compact, harder.

Q. Did you recognize that powder? A. Yes, it was cocaine. I was going to buy from him.

Q. Once he took it out from the talcum can, what did he do with it? A. Yes, he told me that no one in Puerto Rico had that cocaine. That was to be sold from 100 to $125 per gram but since it was—for me he was going to leave it at 80 and then he made some calculations in writing and he told me that this one was more expensive than the one he had offered me first because this one was purer and the other one had a ten percent cut of linocaine and then he told me—I told him that I only had $4,000 and then he told me that for $4,000, instead of the 56 grams which made it two ounces he could give me 50.

He told me not to try to cut it myself; that the cocaine was good and that it could hold several cuts but that if I didn't know what I was doing, I could spoil it and that if I needed help when I was going to cut it, that he would cut it for me and he then got out scales and he weighed it.

* * *

(121) see the relevancy of this line of questioning at all.

> The Court: I don't see the relevancy.
>
> Mr. Monserrate: The relevancy is that he says he knows Manolin for many years and I want to enter into the—
>
> The Court: Objection sustained.
>
> Mr. Monserrate: Besides the family relationship that you had with Manolin, you also had the occasion to share with him the experiences of friendship, right.

A. That is correct.

Q. When you said that you worked for him, did you work for pay? A. He paid me sometimes, others he didn't.

Q. And you said you shared his apartment with him. A. Correct.

Q. And you shared his car. You shared his car also. A. I drove his car whenever I ran an errand for him.

Q. You also used his car on private occasions for you. A. Yes, that is correct.

Q. When was it that you started to work for DEA which means Drug Enforcement Agency? A. Around September of '81.

Q. You worked for DEA on September of '81. You worked for DEA on October of '81.

* * *

(125) Q. That was not my question. I am asking you if immediately after you heard about the death of Manolin's brother there you went to see him. A. Negative. Manolin was in New York. I communicated with him by phone so that he could come here and learn that his brother had died and at the time, as soon as Manolin arrived at the funeral parlor, I saw him, I was there.

Q. When you saw him you gave him your condolence right? A. Correct.

Q. And you stayed with him since that event, you stated for 3 consecutive days. A. That weekend approximately.

Q. Did you go to the funeral? A. Yes, we stayed there.

Q. Isn't it a fact that you were among the first in line at the funeral? A. That is correct.

Q. And that you were embracing Manolin at all times during that sorrow moment. A. That is correct.

Q. And that the same thing you did with Manolin's mother? A. That is correct.

(126) Q. And thereafter you were in more or less constant companionship with Manolin? A. That is correct.

Q. And you were still working for DEA, right, at the time? A. That is correct.

Q. Isn't it a fact that Manolin, during the time of the death of his brother was in a state of total depression? A. He was sad but at all times he was conscious of what was being done.

Q. I am asking you if he was in a state of total depression. A. I can not say.

Mr. de Jesus: Objection, Your Honor, it calls for a conclusion of the witness.

The Court: Overruled. He can answer the question, if he can.

The Witness: I can not tell you whether he was or not in a state of total depression. That can only be said by the person. I can only say what I saw in my eyes.

By Mr. Monserrate:

Q. Because you are not a psychologist or a psychiatrist? A. That is correct.

Q. The truth is that he was drinking a lot? (127) A. Not more than usual.

Q. In other words he was drinking as frequent as he was drinking before? A. I could say so.

Q. And you said that when you heard of Manolin's brother's death, that he was in New York? A. According to what I knew, yes.

Q. And you knew, since you had been in a relationship with DEA for some amount of time that there are DEA offices in New York, is that corrrect? A. Correct.

Q. And thereafter when you saw him during the vicinity of Federico's death, that you were working for DEA. You told us that. A. Yes, that is correct.

Q. Now, you stated also yesterday that all the conversations that you had with Manolin on December 22, December 23 and December 24 of 1981, they were recorded on tape. A. Negative. I mentioned two specific calls.

Q. I ask you if all the calls, all the calls that you made to Manolin during November 22, November 23 or November 24 if all the calls were recorded? A. The ones of December 23 and December 24, yes. On December 22 I did not call him. I saw him at Casa Blanca

* * *

(158) Afternoon Session 2:10 P.M.

(At the Bench)

Mr. Monserrate: At the end of the Government's case defendant Manolin Lecaroz is asking for acquital under Rule 29 (a) of Criminal Procedure, a judgement of acquital. I submit it.

Mr. de Jesus: You just made a Rule 29 Motion?

Mr. Monserrate: Yes.

Mr. de Jesus: Your Honor, we feel in view of the evidence that was supplied in the Court and according to the law that has to do with the Rule 29 motion looking at the evidence in the light most favorable to the government. All the elements of the crime charged has been established by the evidence.

Mr. Monserrate: Do you want me to argue something?

The Court: Yes, sir.

Mr. Monserrate: The basis for my petition on acquital under rule 29 would be on the fact that the government was notified that the defense was going to be an insanity and therefore, the defendant's contention that the government had to establish the fact of the sanity of the defendant at the time of his case in chief, therefore, the fact that the government did not present evidence as to the defendant's sanity in the case in chief has one substantial (159) element of the offense missing therefore defendant requests acquital under Rule 29.

Mr. de Jesus: To that effect I would argue that there is to begin with a presumption of sanity as to defendant's contention and the notice given by way of pre-trial motion is not sufficient to raise the issue within the trial context and such our position is that

the issue has not yet been raised until such time as it is not raised, the government does not have to discharge the burden of proving beyond a reasonable doubt the insanity of the defendant, therefore, we move that the motion be denied.

The Court: In addition to that, the actions of the defendant as of now are the actions of a sane man. There is no indication whatsoever in the evidence that this man is insane and all the actions of a very, very—of a man very well within his own reality so, motion denied.

(In open Court)

The Court: Next witness.

Mr. Monserrate: Your Honor, the first witness for the defense is Lydia Pasatel, viuda de Lecaroz. We will need the services of the court interpreter.

Whereupon,

LYDIA PASAREL DE LECAROZ was called as a witness and after first having been duly sworn, was examined and through the interpreter testified (160) as follows:

Direct Examination by Mr. Monserrate:

Q. Will you please state your name for the record. A. Lydia Pasarel de Lecaroz.

Q. Dona Lydia, are you married? A. Yes, I am a widow now.

Q. During that marriage, did you have any children? A. Two, Manolin, my oldest son and Federico, the second one.

Q. Do you see Manolin in court? A. Yes.

Q. Will you point him out. A. Right there seated in that table.

Mr. Monserrate: For the record, she just pointed to Manolin Lecaroz.

By Mr. Monserrate:

Q. Now, you said you have another child. What is his name? A. Federico.

Q. What happened to Federico? A. He was killed tragically.

Q. When was he killed, Mrs. Lecaroz? A. November 18, '81.

Q. 1981. Now, when your son Federico died, did you (161) have an opportunity to observe and be together with your other son, Manolin? A. Yes, because he was in the United States and he came down when the news came out and he came here, he was destroyed because they were two brothers that loved each other very much.

Q. Could you tell the Honorable Judge and the honorable members of the jury what was it that you noticed in Manolin when he came from the United States to his brother's wake? A. Well, he came in here, he was destroyed, crying, well, very sad due to what had happened.

Q. After he came, during the days that followed, what if anything did you notice in the behavior, emotional and mental behavior of Manolin? A. Well, he went home to accompany me and I was able to observe him. He didn't sleep at night because he was always awake there in the room and whenever he is under stress he drinks and then in the morning I found him, he was still sitting in the porch. He hadn't gone to bed. I saw him, he was looking at space like this and I asked him to go to bed to sleep for awhile and he went and rested for awhile. At times I heard him,

he had nightmares and I would hear him speaking and he was like this for about two weeks and he also was under stress. He was worried. There was a revolver in

* * *

(163) A. Then he left the house. He went to his apartment.

Q. In what condition was he when he left the house? A. Well, at all times he was anguished and he was desperate because at all times he wanted to know who had done.

He was even offering rewards to find out who had done it and he had that obsession because he wanted to know who had done it.

Q. Had you seen—I withdraw the question. Was that the first occasion that you saw Manolin in such a state of depression? A. No, the first time was when his father became very ill.

Q. In what year was that? A. In '68.

Q. Will you explain to the members of the jury what happened then? A. Well, he had already joined the National Guard as a volunteer and he had been in the service more or less one week. I believe it was in Fort Dix in the United States. And then my husband and I were in Washington which is where he got sick and it was then that the diagnosis was learned that he had to be operated, it was a very serious operation due to cancer. They gave him a pass so that he could be there a couple of days, together with us. He was anguished.

* * *

(180) withdraw the question. What happened to Manolin's brother on November 18 of 1981? A. Well, Manolin's brother, Fico was tragically killed and it was a very, very sad situation for the whole family.

Q. All right. Will you tell us, if you know, what was Manolin's condition after he learned of his brothers death? A. Well, his condition was very drastic, extremely depressed boy.

Q. Will you explain in details. A. Well, he was, it was a question that Manolin was crying at times, especially for instance during the masses that were held for his deceased brother and I would recall just watching him over. He was in the pew and his eyes were completely out of focus and completely in a state of depression which I was highly impressed with it. That was one occasion which showed his state I thought and while he was at home visiting very frequently his mother, it was also a very sad situation to see him occasionally flare up and talking loud and banging walls and so and drinking.

Q. What type of drinking? A. Well, regular drinks, he has scotch or hard liquor.

Q. No I don't mean the liquor, the amounts. (181) A. The amounts, well, he was visiting it was one after the other while I was there.

Q. And what did he do if anything in regard to what you are explaining? What was his emotional condition to you? A. Emotional, I thought he was destroyed, this guy was very depressed, crying, would sit in a corner, on the side of the balcony and see into space and you could see he was crying and then he would talk loud again on other occasions, other types of conversation.

Q. Have you been related to him in terms of relationship more than an aunt when he was a youngster?

A. Pretty close to him or close to me or so because we saw each other a lot. We lived together. I mean when my parents were alive and we all lived together so I knew Manolin since he was born.

Q. Can you tell us if after Fico's death if you have seen anything in his behavior on the occasions, other types of conversation? also very sad and depressed? Have you had an experience with him when he was a youngster relevant to his pattern of behavior? A. Well, he was erratic in many ways, sometimes he would flare up or sleep until late, just not—in a kind of a disorder type situation in his behavior.

Mr. Monserrate: Thank you very much.
The Court: Thank you. Mr. de Jesus.

* * *

RICHARD BENITIZ, direct.

(186) graduate? A. 65. But the school year start in September it also runs into the next physical year?

Q. In regards to Mr. Manolin second year, will you tell the members Jury what the behaviour was in that second year? A. He had a very strange behavior.

The Court: I didn't hear.
The Witness: I said he had a very strange behavior.

Mr. de Jesus: Objection, Your Honor, I think that the question as posed right now is without sufficient basis.

The Court: Overruled.

A. Manolin had his room very dark, he painted it black. He had no light, he stayed in his room the full semester, he didn't attend class he was in a very depressed mood, he was constantly drinking. He would not leave the room for no apparent reason. We would talk to him but any way we talk to him he would not make (187) sense. Why he would for any reason, I don't know.

Q. Did anything happen in particular that call your attention to his behavior? A. Well. One night he apparently took some pills which I don't know what pills they are. I found him semi unconscious on his bed. And one other house mate from Panama and I took him to the Georgetown Medical Center where they pumped his stomach and left him over night in the hospital. The next day we picked him up and we tried to get him some Psychiatric help but he would refuse any kind of Psychiatry help. He said that Phychiatrist didn't help him they were after him.

Q. Could you tell us if he stated any reason why he drank those pills in those amounts?

Mr. de Jesus: Your Honor, I Object, that is hearsay.

The Court: I will sustain the objection.

Mr. Monserrate: Your Honor, in consideration can we approach the bench?

The Court: Do it right there.

(188) Mr. Monserrate: The statement from the Defendant is an exception to the hearsay rule.

Mr. de Jesus: Your Honor, it might be a self serving statement, it is not hearsay, I can't cross examine the witness.

The Court: objection sustained.

By Mr. Monserrate:

Q. So you went to his room. Would you explain in details how was he to that event you mentikoned? A. I mentioned before he was right next door to my room. I walked in the room, he was lying in the bed, I don't know if he was sleep or unconscious just laying down with his mouth open like. I don't know how to describe it because I am really not a Doctor. I tried to wake him up, he wouldn't respond. So I got scared. I call the gentleman. We took him to the hospital.

Q. What happened in terms of time? A. Shortly after that, I think he had a professor—

Mr. de Jesus: I object, his testimony, he believe, I think it is hearsay.

(189) The Court: Overruled.

A. There was a professor called George Houston, who was friendly, on the university staff, called his parents and told them he was not attending class, they complained on his behalf.

Mr. de Jesus: I object, this testimony is is hearsay.

The Court: I believe it is hearsay.

By Mr. Monserrate:

Q. What happened then? A. The parents went to Washington. They took him out of the school and brought him back to Puerto Rico.

Q. Did you have occasion or the opportunity to be in relation with Malina the following year until present? A. Yes. He came back. Obviously, I stayed in school and finished my college. we have been friendly, we see in the

last several, he lives right on top of me. So I see him constantly.

Q. Can you tell the members of the Jury his general behavior since he left Georgetown university? A. He has a very erratic behavior. Some (190) days he is depressed, some days he is not. He is am up and downhill situation.

I would like to mention something that stands out. The death of his brother. I think that was 1971, Where he went into a similar situation which I had experience in Washington, very depressed, drinking constantly and that type of behavior. During that time I would visit him and try, he is my friend naturally I try to help him. In talking to him, any way I could help him, telling him go to a Phychiatrist. And one night he was talking about commiting suicide and started walking towards the balcony, I notice, I literally grabbed him around the waste, I calmed him down and I talked to him serveral hours and spent the night with him. Making sure he didn't do anything drastic.

Mr. Monserrate: I have no further questions.

The Court: cross-examination.

By Mr. de Jesus:

Q. Since when did you quit work for Wometco?

* * *

(197) A. 914.

Q. Do you recall at any time in the year 1980, to be exact the 26th of June 1980. Being visited by a Police of Puerto Rico, an agent by the name of Ayala? A. No.

Q. Do you recall if you were intervied that day by Agent Ayala regarding an application that was put in by Manolin to possess a fire arm? A. I don't recall that.

Q. Do you recall any request that he might asked of you that day? A. No.

Q. If I showed you a document would it perhaps refresh your menory? A. I don't know.

Q. Do you recall at any time Manolin having sought or seeking to buy a gun? A. I don't recall that at all.

Q. You don't recall being interviewed by a police investigator regarding that? A. no.

Q. Do you know if Manolin has a (198) gun? A. I think he has.

Q. Now, S you mention that you had known Manolin since before 1963? A. That's correct.

Q. And that you are his neighbor? A. Yes.

Q. And the year 1980 you were vice-president of Wometco of Puerto Rico, is that correct? A. That is correct.

Q. And that Wometco of Puerto Rico is located on Ponce DeLeon, 1406 in Santurce, is that correct? A. That is correct.

Q. You live in apartment 914 Condominium Park Boulevard? A. Yes.

Q. I am showing you what has been identified as Government Exhibit number 5, it is a photocopy; would you please review that document. A. Yes?

Q. Do you recall ever being visited by a police of Puerto Rico, Agent Ayala and being asked the questions that are contained in the (199) form there? A. I don't recall it at all.

Mr. de Jesus: I have no further questions.
The Court: Any Re-direct?
Mr. Monserrate: No, Your Honor.

* * *

(217) Mr. Monserrate: We'll call CARLOS ALVAREZ. (witness reads oath.)

By Mr. Monserrate:

Q. State your name? A. Carlos Alvarez.
Q. What is your profession? A. Businessman.
Q. Do you know Manolin? A. Yes.
Q. Did you see Manolin on July 27 of 1982? A. Yes.
Q. Tell the members of the Jury exactly what happened on July (218) 27, 1982? A. On July 27 of 1982 I drove Manuel Pasarell to Juliard clinic at 10 clock in the morning.
Q. What type clinic is that? A. Psychiatric.
Q. What happened? A. Manolin had an appointment at 10:30 with Doctor De Tomas, I believe and we waited.
Q. You believe, are you sure? A. I am sure. We waited in the lobby until 10:30 exactly 10:30 he went in the lobby of what we presumed to be Doctor De Tomas office and came out at 10:48. After we came out, we drove back to Doctor Carcia's office.
Q. Who is that? A. Doctor Manuel Carcia, he is a Psychiatrist.

Mr. Monserrate: That is all, thank you very much.
The Court: Cross examination.

Cross Examination By Mr. de Jesus:

* * *

DR. MANUEL GARCIA

(233) Q. You had an opportunity to do so? A. That is correct, sir.

Q. Will you tell the ladies and gentlemen of the jury on how many occasions did you have opportunity to treat and take care of Manolin Lecaroz Pasarel. A. I was able to see Mr. Lecaroz July the 9, July the 12, July 14, July 19, July 21, July 27, August 18, September 16, September 30, October 13, November 21, December 17, 1982, January 13, January 26, February 11, February 28, March 16, March 30, April 11 and April 18, 1983.

Q. You testified that you saw him on July 27 of 1982. A. That is correct, sir.

Q. Will you please state specifically as to that date if you saw Carlos Alvarez. A. Mr. Alvarez and Mr. Lecaroz were in my office from 9 o'clock to 10 o'clock in the morning that day.

Q. What occurred if anything in relation to Carlos Alvarez and Manuel Lecaroz? A. Well, Mr. Alvarez was going to drive Mr. Lecaroz to the Hato Rey Psychiatric Hospital or the Julia Clinic which is three and a half blocks away from my office. My office is at Banco Popular Center in Hato Rey and Julia Clinic is in the corner of Eleanor Roosevelt and Ponce De Leon Avenue in Hato Rey.

Q. Anything in particular that day to Manolin Lecaroz (234) and Carlos Alvarez? A. Yes, I asked Mr. Alvarez to be specific to deal with the time that occurred between Mr. Lecaroz' departure to the psychiatrist and the time he was going to return to him.

Q. Return to where? A. To where Mr. Alvarez was waiting for him.

Q. Was that request of yours fulfilled? A. Yes.

Q. What was the result? A. Well, Mr. Alvarez and Mr. Lecaroz returned to my office about two minutes before eleven o'clock that morning. They left at ten. They returned two minutes before 11 and Mr. Alvarez told me—

Mr. de Jesus: Objection, that is hearsay.
The Court: Sustained.
Mr. Monserrate: He already testified as to that.

By Mr. Monserrate:

Q. You stated that you examined Mr. Lecaroz on those occasions that you mentioned day by day. Now, besides the examination and interviews with defendant, Manolin Lecaroz, did you do any other type of work with him. A. Well, I interviewed him. I tested him. I also interviewed several members of Mr. Lecaroz' family, for example his mother. (235) I interviewed Mr. Lecaroz' girlfriend and I interviewed Mr. Lecaroz. I tested him and I was also able to examine and analyze some documents that were given to me by Mr. Lecaroz' psychiatric reports, medical data, etcetera.

Q. Medical data that are parts of patients' history then? A. That is right, sir, a part of my record.

Q. Now, let us start first with the total hours, approximately total hours that you worked and was working professionally with Mr. Lecaroz? A. Around 340 hours, from August 18 to the present time he has been in treatment with me.

Q. And still at the present time? A. He is, twice a month.

Q. Will you please meaning the fact of the tests that you performed on him. A. Sure. It is the standard battery of tests by clinical psychologist in order to diagnose an emotional condition. I administered the Wechsler adult intelligence test.

Q. What is that? A. It is a test designed to measure the intellectual resources of a person and also designed to establish how

* * *

(238) is geared torward dealing with numbers, accounting, economics and he has an innate abiliity for numbers. Some people have it and some people don't and he has it.

Q. And you say that he was sick. What do you mean by that? A. By sick, he has an emotional disturbance at this moment of the present nature. My diagnosis is that he is suffering from a depressive psychosis.

Q. Will you explain to the jury what is that. A. Sure. A psychotic depression is a mental disease characterized by an extreme disturbance of feelings or effects as a result of environmental stress or stressors.

Q. What is that? A. Or traumatic experience.

Q. What is that? A. Well, a stressor—

Q. I am sorry, I withdraw the question. Will you please finish your definition. A. Sure. Sure, a depressive psychosis is a mental disease characterized by a feeling or affects as a result of enviromental stressor are traumatic experiences like the loss of a beloved one, for example the loss of a father or a brother or a sister or whatever, the loss of a job, the loss of a house or something like that. It is an experience, has an impact upon the patient that induces psychotic behavior

* * *

(241) Mr. de Jesus: Objection, Your Honor, he is being leading.

The Court: Overruled.

The Witness: It is a mental disease.

By Mr. Monserrate:

Q. Now, could you distinguish that mental disease from schizophrenia? A. Sure, schizophrenia is the most common type of psychosis.

At least 50 percent of all the psychotics. Psychotics in Spanish is what we call locos. Psychosis means psychotic.

More than 50 percent of all the psychotics are schizophrenic and schizophrenia is a different type of mental disease because it is equivalent to what we call split. Split means that our personality is split, our actions are split from our thoughts and our thoughts are split from our feelings and our feelings are split from the actions, therefore we are split. We can not integrate our personality and we suffer from schizophrenia, the patient suffers from dillusions.

Q. What is that? A. What we call in Spanish delirios, delirious of grandeur, delirious de grandesa, dillusions of persecution. We are being persecuted. The schizophrenic suffers also from

* * *

(243) It is a different type of psychosis. It is breaking away from reality and suffering and feeling that you are not loved by others, that your self worth is very low, your self esteem is very low and you want to disappear, you want to kill yourself, you want to do some horrible things to yourself, you want to suffer.

Q. Now, in your opinion, you say that you performed tests and we are going to go into that. The mental disease that Mr. Lecaroz had when you finished your examination, your opinion as to his condition on December 24 of 1981, what was it? A. Well, Mr. Lecaroz has been suffering from a depressive psychosis since 1968 up to the pres-

ent time. In some instances he looks better, he seems all right. Sometimes you look at him and he doesn't look like a psychotic because he can function all right, when he is in the remission of symptoms.

Q. What is that? A. Remission of symptoms is very important because it is the concept which explains why people can be crazy without showing it in his behavior, so he looks like he is all right, he looks like he is healthy but he is psychotic.

Q. Psychotic means what? A. Loco, crazy, remission of symptoms means that all the symptoms disappear without treatment and without drugs

* * *

(247) Mr. de Jesus: Objection, Your Honor, leading.

The Court: Sustained.
The Witness: A psychotic person.
The Court: Hold it, don't answer.

By Mr. de Jesus:

Q. When you say psychotic person what do you mean? A. That he has many symptoms and one of the symptoms is his inabilities to grasp reality. That means that he distorts reality. That is one of the characteristics.

Q. Did that that test show that? A. Yes, it is a gross distortion of is body's image and a gross distortion of the body's image as of his mother and two daughters. There is this way he sees them when he looks at them. It is very psychotic.

Q. What else was in that test if anything? A. I administered him the Rorschach test, nothing else in the draw a person.

Q. The Rorschach test, what is that? A. The Rorschach test, that is the most important test used for a clinical psychologist. It consists of 10 ink blots that are administered in a sequence and the patient is asked to report and to describe what he sees in the ink blots and this is recorded, scored and compared with a sample of normal or functional subjects.

Q. Did you analyze the answers to the Rorschach?

* * *

(255) here, see figures like lobsters and crabs, coral. It is a typical scene of fishes and corals and things like that.

Q. What is your interpretation of Manolin's answer? A. If you integrate these reponses to the typical responses with the draw a person responses and the Wechsler responses, the picture is obviously of a psychotic person who can organize himself to a certain extent if there are no outside stressors but with the presence of outside stressors, he becomes easily disorganized and can behave in a psychotic manner.

Q. Now, besides the tests that your performed on him to arrive at the conclusion that you testified here as to his condition on December 24 of 1981, what other data did you study to come to that conclusion? A. Well, I have interview data and I have reports written by other psychiatrists.

Q. Did you study those reports? A. That is correct, sir.

Q. Are those reports of whom? A. Well, there is one report by Dr. Jose R. Vigoreaux.

Q. Who is Dr. Vigoreaux? A. Dr. Vigoreauz was at that time a lieutenant colonel of the medical corp of the Air National Guard and he was a diplomate psychiatrist of the American Board of

* * *

(258) paranoid ideas.

Q. What is that? A. Ideas of persecution when he is in the middle of a crisis he suffers from ideas of persecution; that when he is in the middle of a crisis he shows a very progressive ability to distort his own reality and that he can fall into a crisis when outside stressors occur like the death of his father in 19— like the cancer operation of his father in 1968 and the death of his brother in 1981.

It is my opinion that Mr. Lecaroz when he is in the middle of a crisis has strong suicidal thoughts and ideas and that he is capable of committing suicide and that he needs intensive hospitalized psychiatric treatment as soon as possible. That is my conclusion.

Q. What would be your recommendation having to do with the patient, Mr. Lecaroz?

Mr. de Jesus: Objection, Your Honor.

The Court: He already says that he needs treatment.

By Mr. Monserrate:

Q. Do you think that Mr. Manolin Lecaroz, with the disease that you stated, depressive psychosis that he has on December 24, 1981, that he would substantially be affected in his mental or emotional process and substantially impair his behavioral thoughts?

(259) Mr. de Jesus: Objection, Your Honor, leading.

The Court: Objection, he is leading.

Mr. Monserrate: He is an expert. It is hypothetical.

Mr. de Jesus: It is not phrased in a hypothetical manner.

The Court: it is not phrased as a hypothetical question, Mr. Monserrate.

By Mr. Monserrate:

Q. With that sickness that he has, according to the expert testimony, what would be the effects of that sickness in regard to Mr. Lecaroz' emotional and mental condition? A. Could you repeat the question again?

Q. You testified here that he dollars depressive psychosis. A. That is correct.

Q. I ask you if with that sickness, what effect does that sickness have in his mental or emotional process? A. Well, his capacity to guide his life, his capacity to control his behavior, to assume responsibilities for his behavior, his capacity as a worker, as a productive worker, his capacity as a spouse, in a marital relationship, all of those capacities are impaired.

He can not be the head of a family. He can not work productively. He can not study, he can not manage his (260) own life.

Q. And that process or that result is the effect of what, if anything? A. It is effect of live long events from childhood on all the different life situations that he is going through in his life, specially in his adolescence and specially when he was sent to study to the states and what happened to him when he was studying in the states and what happened to him when he was in college, what happened to him when his father suffered, was diagnosed as suffering from cancer and what happened to him after the death of his brother.

If we sum up all of these events, being a very weak can] person, we can explain why he has been behaving the way he is behaving, in a psychotic manner.

Q. When you say in a psychotic manner, please explain that. A. psychotic means crazy, it means loco.

Mr. Monserrate: Thank you very much.

The Court: We will take a 10 minute recess before going into cross examination.

(A recess was taken at this point)

Cross Examination By Mr. de Jesus:

Q. Good morning ladies and gentlemen of the jury. Good morning, doctor. Doctor, earlier when you were stating

* * *

(281) The Court: Thank you.

Mr. de Jesus: Your Honor, we move the Court to allow us to open our case in chief so we may present evidence to rebutt the insanity defense issue that was raised.

Mr. Monserrate: Before that may we approach the Bench?

The Court: Yes.

(At the Bench)

Mr. Monserrate: I move now this Honorable Court for a judgement of acquittal under Rule 29 after the defense has presented his case and reaffirming the position that the defense of insanity was notified to the government and at this moment there is no evidence whatsoever to establish that other than the defendant was insane at the moment that the crime was committed and rebuttal evidence is not evidence of the case in chief and not being evidence of the case in chief at this stage would be just to contradict or impeach in some way or fashion or at least to try the evidence of the defense and the Court this morning has the evidence of the case. It is the jury that can determine the guilt or in-

nocense of the defendant and as such the defendant should be acquitted because there is no sufficient evidence in the court to establish this case specially now that the defense has shown that the defendant was insane at the moment (282) the facts were committed.

Mr. de Jesus: Your Honor, in terms of Rule 29 motion, first of all there was evidence in the form of lay testimony which if looked at in the light most favorable to the government immediately would rebutt whatever insanity defense has been presented by the defendant. In any event, I submit to the Court that this was discussed informally that the procedure that is to be followed during the trial would be that the government would present the main case in chief, profer the elements of the count, the only count of the indictment; that subject to that, once the issue of insanity was raised by the defense, then the government would reopen the case in chief and discharge the burden of proving insanity beyond a reasonable doubt and in that respect it has been the procedural order that we have followed.

Inspite of the fact that we had discussed that procedural order informally and noted on the record and I state it is so now, even then there was evidence in the form of testimony of Mr. Pedro Tirado to the effect that on that day, particularly on that telephone conversation whre the defendant was talking about some business dealings would tend to show that the defendant was indeed sane on the date in which this action took place.

The Court: Motion is denied and I will allow in my discretion, the prosecution to open the case (283) in chief. Motion under Rule 29 is denied.

Mr. Monserrate: We object.

The Court: Yes, you have stated your point.

Mr. Monserrate: On new grounds.

The Court: Go ahead.

Mr. Monserrate: This Honorable Court has opened the case in chief for the government, has permitted the government to open its case in chief and as such, it has affected defendant's Constitutional Right to face the case of the government only once, being exposed to new evidence not brought in the case in chief and as such in the way he fashioned and prepared his defenses for the case in chief now are jepardized because the government is permitted to open the case in chief and not as rebuttal, therefore, I think that under this condition, defendant asks for the dissolution of the jury and ask for a new trial in order for him to present adequate defenses and prepare adequately for the evidence that the government is going to present in this case.

Mr. de Jesus: Yes, I wish to clarify for the record that the order that the government intended to present the evidence was discussed with the defense and no objection was raised and this discussion took place informally before the start of the trial.

(284) What was discussed was exactly that the government would present its case in chief, just evidence as to the elements of the charge of the count that once and would rest subject to reopening its case in chief should the defense of insanity be raised.

At that time I had a consultation with counsel for the defense and asked counsel for defendant whether he was going to present his whole insanity defense in one step or at a one shot deal or whether he was simply going to present sufficient evidence to simply raise the issue, force the government to reopen its case in chief to present the evidence, to rebut it and then for the defense to come in and rebut the government's rebuttal of the defense of insanity. In that respect it was communicated to myself that the defense, defendant's counsel intended to present all his evidence in a one shot deal.

Mr. Monserrate: May I answer, Your Honor?

The Court: Yes.

Mr. Monserrate: It is a clear principle of law that the defense attorney is not to be the guide or the teacher or advisor or whatever as to the way the government should present its case. If the government wants to present its case in a particular way, that is his choice but it is for the defense to protect the defendant's rights so the choice of the government to present the evidence the way (285) he has presented is his own choice and I can nnot give him advice as to how and why he should do tings.

It is a clear principle of law that once the government rests, the only thing that the government can do is to present rebuttal evidence and not to open the case in chief and as such we oppose it. The rules of law—of procedure to back us in that position we have and as such we object that the government open its case in chief.

The government later is permitted to rebut but not to open the case in chief. There is ample law on that.

The Court: inspite of all that, defense was well aware of the method that was going to be used by the prosecution and although I agree that defense doesn't have to advise the prosecution. The defense at least has the obligation to object to anything taht might tend to prejudice the rights of his client and the method that was to be followed, was clear to everybody and the defense never objected.

Now, as of now I will use my discretion and I will allow the prosecution to open his case in chief.

I don'y want to hear any further argument.

(In open Court)

Mr. de Jesus: We again restate our motion to allow us to reopen our case in chief for the opposition of the insanity defense.

* * *

DE THOMAS.

(292) A. Yes, sir. Mr. Lecaroz was referred to me by this Court to perform a mental evaluation for the purpose of establishing his mental capacity to stand trial.

Q. Without going to the results of that examination, I do not wish for you to divulge the results. Were you able to examine the patient on that occasion? A. Yes, I did.

Q. Since then have you been able to consider other factors regarding this particular patient? A. Well, I have some evaluations that were sent to me and a recording of a conversation which was sent to me.

Q. Those evaluations that were sent to you, what are they? A. I beg your pardon.

Q. What are those evaluations that were sent to you? A. One of them is a letter sent by Mr. John L. Cameron to the medical officer of the National Guard. Another is a letter by the same person and there is a certificate given by Dr. Jose R. Vigoreaux.

Q. Who is it addressed to? A. "To whom it may concern".

Q. So, it is in the frame of a certificate. That is what you call it?

Mr. Monserrate: That is leading.

Mr. de Jesus: I withdraw the question.

(293) The Court: Yes.

By Mr. de Jesus:

Q. Now, sir, you mentioned a recording. What recording was that? A. This is a recording of a conversation which was held.

Mr. Monserrate: Objection.

The Court: I didn't get what you said, doctor.
The Witness: It is a recording of a conversation.

The Court: What is the objection?
Mr. Monserrate: May we approach the Bench?
The Court: Approach the Bench.
(At the Bench)
Mr. Monserrate: If he is going to talk about the tape, he is going to talk about a tape that has not been admitted in evidence.
Mr. de Jesus: Your Honor, the tape will be offered in evidence at a time subsequent to his testimony.
Mr. Monserrate: But he can not talk about—
The Court: He can not refer now.
Mr. de Jesus: He is not going to refer to the contents of the tape. He is going to refer that he listened to the tape and listened to the tape that he listened to

* * *

(304) Q. Now, in taking into consideration the interview that you had with Mr. Lecaroz, the diagnosis that was made by Dr. Fumero, the conversation that you had with Mr. Pedro Tirado and the tape that was provided to you, do you have an opinion as to the mental condition of Mr. Manuel Lecaroz on the date of December 24, 1981?

Mr. Monserrate: Objection, Your Honor.
The Court: Overruled.

The Witness: I don't have evidence to give an opinion in terms of what mental condition he had at such date but in view of my evaluation and other facts that I have received,

I don't have evidence to sustain that he was psychotic at that time.

Q. What diagnosis have you made of this particular patient? A. Well, when I examined him I didn't make a diagnosis because that was not the purpose of it. The purpose was to find out whether he was mentally competent but reviewing the facts that I have, the letters I just told you (305) about and the conversation with Dr. Fumero, I believe that the diagnosis in this case is a personality disorder characterized by anti-social personality.

Q. Do you feel that that diagnosis as it is, that you have of Mr. Lecaroz, does that condition prevent him in any way to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the Court?

Mr. Monserrate: Leading.
The Court: Sustained.

By Mr. de Jesus:

Q. As of the date of December 24, 1981, what is your professional opinion regarding this defendant's abilities to conform his conduct to the requirements of the law based on the information that you have before you?

Mr. Monserrate: Objection.
The Court: Overruled.

The Witness: I don't have evidence to sustain that he was not aware between right and wrong at the time of the commission of the offense.

Q. So, to phrase it in the positive rather than the negative point of view—

Mr. Monserrate: Leading.

The Court: He hasn't finished his question. Overruled. Go ahead.

By Mr. de Jesus:

(306) Q. To place it in a positive rather than a negative point of view, it is my understanding, correct—

Mr. Monserrate: Objection. Obviously it is a leading question.

The Court: Let him finish. That is the only way I can be in a position to render a ruling based on what he is actually asking.

By Mr. de Jesus:

Q. That the defendant at that time could appreciate right from wrong?

Mr. Monserrate: Objection.

The Court: Overruled.

The Witness: Will you please ask the question again.

(The question was read by the reporter)

The Witness: Well, in view of the examination I performed and the facts that I have, I have no evidence to say that he was not aware between right and wrong.

* * *

(318) used by the universities throughout the world, "Abnormal Psychology, Perspective On Being Different" Martin Duke, author and Steven Nowiccam? A. Yes.

Q. You recognize that this is an authority in the field of psychiatry? A. I would say it is a very good book.

Q. Now, I was asking you what is a psychotic depression. A. A psychotic depression is a condition where a person is having two different disorders. He is having a depression and he is psychotic at the same time.

Q. And a person under that condition, would you say that could make or could be affected or probably was affected in his pattern of behavior? A. He should be affected in his pattern of behavior.

Q. And he shouldn't be affected also in his capacity to control his behavior? A. It all depends on the degree of psychosis. We would have to see the person. It all depends. Psychosis has many degrees.

Q. Yes but a person suffering from that sickness, would you say that it is probable that he could have serious difficulties in controlling the behavior? A. I would say that.

(319) Q. If a person suffers from that sickness, that sickness could be triggered or could be accentuated if serious trauma is received by the person suffering from that disease? A. What kind of trauma?

Q. For instance the death, the sudden death of a beloved brother. A. Well, if a person is suffering of a psychotic depression and he has that kind of trauma, probably the depression is going to be more evident, should be more evident.

Q. And naturally it is going to affect more the capacity to control his behavior. A. Probably.

Q. Doctor, not only would you say that it would affect probably his capacity to control behavior but it would affect also his mental and emotional process. A. Those processes are already affected if there is a psychotic depression.

Mr. Monserrate: Thank you very much.
The Witness: You are welcome.

The Court: Redirect.
Mr. de Jesus: Yes, Your Honor, very briefly.
The Court: I will take your word.
Mr. de Jesus: Yes, sir, I will be through

* * *

LOPEZ.

(364) (The above-mentioned documents were marked Government's Identification 10 & 11)

By Mr. de Jesus:

Q. Agent Ayala, I hand you what has been marked as Government Exhibit 5. Do you recognize that document? A. Yes, sir.

Q. Who signed that document, if you know? A. Mr. Manuel Lecaroz Pasarell.

Q. Is there any information there regarding his physical condition? A. That is correct, yes.

Q. Would that be under paragraph 5 of the different items of information contained therein? A. What is that?

Q. Is there a paragraph 5 or item number 5? A. No, there isn't. Not in this one.

Q. I make reference specifically to the last two questions on the right hand column of this exhibit which for the benefit of the record is actually Government's Exhibit 5 rather than 10 as I had identified it earlier. Could you please read the last two items of information with their respective answers.

"Have you suffered any mental illness? No. Do you have any nervous impediment? No." Who signed that (365) document? A. Manuel Lecaroz Pasarel.

Q. I show you now what has been marked as Government Exhibit 6. Could you please tell me what that document is? A. This is what we fill out from the neighbors.

Q. And whose name does it appear there of the person that was interviewed? A. Richard Beritez.

Q. Where does that person live? A. At Park Boulevard Condominium, apartment 9 M lateral.

Q. Would that be 914? A. No, it is Park Boulevard Condominium, apartment 9 Santurce, Puerto Rico.

Q. Does it state here what that person's occupation is? A. Vice-president and merchant at Wometco Puerto Rico.

Q. Does it state there how long he had known Mr. Lecaroz? A. Yes, sir.

Q. How much is that, for how long? A. 10 years.

Q. Could you please refer to item number 5. Could you please read the question stated under A and the answer.. (366) A. "Physical condition, letter A, has he suffered any mental illness". The answer is, "no. Does he have any nervous impediment? No."

Q. On item 7, could you please read the question asked and the answer given.. A. 7, "personal characteristics. Question. Does he control his agressive impulses? Yes, be impartial in decision making? Yes".

Mr. de Jesus: Thank you. I have no further questions.

(The above-mentioned documents were marked Government's Identification 5 and 6)

The Court: Cross examination.

Cross Examination by Mr. Monserrate:

Q. Don Estilito, is that your name? A. Yes.

Q. How many years did you work doing investigation for the Police Department of Puerto Rico in regard to people who were requesting permission to own a gun? A. Well, I have been there ten years but doing investigation it is 3, 3 and a half.

Q. And during those 3 and a half years I guess you must have interviewed many, many, many petitioners, right?

* * *

(428) because he got stabbed in the back. Think, if you are going to be sorry for anybody, the person who were going to be using that cocaine, of all the persons from Hogar Crea who—

Mr. Monserrate: Objection, Your Honor.

The Court: You should not go into that.

Mr. de Jesus: Very well, Your Honor. Mr. Pedro Tirado is not Judas here. The Judas here was the defendant, of what he was doing in the selling and distribution of the cocaine, remember it. It was of 94 percent purity. That is what the chemist here testified. Nobody else in Puerto Rico had that kind of cocaine here.

He said so himself in the tape.

We are not talking solely about the cocaine being sold, we are talking about the best, 91 percent purity.

There is a strong attack here made against Dr. De Thomas. The fact is that he testified that he didn't need to see Manuel again. Why? Because he was convinced that Manuel at the time of December 24, 1984, did have a substantial capacity.

Mr. Monserrate: That is not correct.

Mr. de Jesus: Your Honor, the hypothetical question was asked and answered in the affirmative that he had the substantial capacity to appreciate the capacities of is conduct and that he could conform his conduct as to the requirements of the law.

* * *

Charge.

(450) The Court: It is a different form of language but I told them already there. It is the same language that we worked for over 3 hours. I will tell them there. I will read it for the record. "Should you find that the prosecution has failed to prove all the elements of the crime charged and the sanity of the defendant as already explained to you beyond all reasonable doubt, you must find the defendant not guilty". That is in there, beyond all (451) reasonable doubt. They have to find the defendant, beyond all reasonable doubt in order to bring a verdict of guilty. That is what I told them. Are you in agreement? We worked this over for over 3 hours.

Mr. Monserrate: Do you want me to raise at this moment which I think were errors in the terms of the United States Attorney's summation?

The Court: I beg your pardon.

Mr. Monserrate: Do you want me to raise the errors contained in the United States Attorney's summation which damaged the defendant's rights now or do you prefer after when we send the jury to deliberate.

The Court: Do you agree with these instructions?

Mr. Monserrate: Yes.

The Court: So you withdraw your objection? No further objection Mr. de Jesus?

Mr. de Jesus: No objection, Your Honor.

The Court: All right, thank you.

(In open court)

The Court: All right, this is the time in which I have to discharge two of the persons that have been with us all throughout this trial and have heard all the evidence for these 4 days and now at the most important part of the trial, I have to discharge you because you will not be

* * *

(456) As to the remark regarding Dr. De Thomas, my recollection is that the statement by the defendant, I mean by counsel for the government is supported by the evidence.

If you wish we might go to the record, no.

Mr. Monserrate: It would have no purpose at this moment.

The Court: If you want I will do my best to (457) cure whatever damage has been done.

If there is no further request in that respect let us wait for the verdict.

Mr. Monserrate: The question of the statement of Dr. De Thomas, if it is found in the record that De Thomas did not say anything as to that, would the jury be instructed as to that again?

The Court: I beg your pardon?

Mr. Monserrate: If in the record it shows that Dr. De Thomas did not make that statement would you instruct the jury again?

The Court: Well, if the statement given by the United States Attorney is not supported or is against the evidence, I will give an instruction, yes.

Mr. Monserrate: All right, so then I would like the stenographer to look for the testimony of Dr. De Thomas to see if it is as I claim that Dr. De Thomas did not men-

tion the fact that this defendant could distinguish from right and wrong in the wording that was made.

The Court: All right, the reporter first will ascertain the specific statement of the United States Attorney and then will search Dr. De Thomas' testimony which was not very long or extended. Okay.

(A recess was taken at this point)

(In Judge's Chambers)

(458) The Court: I was drafting an instruction for the jury regarding the statement of the United States Attorney as to what Dr. De Thomas said and I was going to tell the jury that it was their recollection that controlled and not what the United States Attorney states as to what Dr. De Thomas said. There was an objection by the United States Attorney and I decided not to give this instruction because I feel that this is covered by the instruction generally given and as a matter of fact the U.S. Attorney, when he started his arguments he stated that what he said is not evidence and that is it.

Mr. Monserrate: May I have the note? For the record, the defense wants to make clear the following points. While we were at chambers I had raised the issue in time as to the fact that the United States Attorney had made a statement to the jury in his summation, in his final summation referring to the fact that Dr. De Thomas had stated that defendant could determine the wrongfulness of his act. In other words, that he could determine between right and wrong at the moment that the events occurred in December of 1981. I objected to the statement because it was incorrect. Doctor De Thomas never stated that in the

record. As a matter of fact what he did state was that he did not have any evidence to establish that defendant was insane, so, once we went to the record, we checked the record with the (459) stenographer, Mr. Vazquetella, and it was shown clearly that Dr. De Thomas did not make that statement.

Since the issue for defendant in this case is strictly the insanity issue, he accepted this in part, at least the fact that the transaction occurred. The issue is so delicate as to the nature of the defense of insanity that the only expert presented by the government was Dr. De Thomas and making the—informing to the jury, letting the jury receive a mis-statement of fact, crucial to defendant's point of view and crucial to defendant's defense is certainly, it was an error by the United States Attorney and the jury should have been instructed to the fact that that statement was never made. As a matter of fact—

The Court: Well, the trouble with that—let me interrupt you there. The trouble with that is that at the time that the U.S. Attorney made the remark you limited yourself to state that that was incorrect. The United States Attorney kept on going, explaining other matters, related matters and you didn't make any objection and you didn't place the Court in a position at that time to issue a cautionary instruction if I thought that it was the proper course to do or the proper course to follow and there was no objection whatsoever at that time which was the proper time.

Mr. Monserrate: But there is no disagreement at all of the fact that at the Bench I did ask the court if (460) the court wanted my objections to the way the statement made by the United States Attorney's summations were a mis-statement of fact and in order to raise the issue for the jury I asked the Court if the Court wanted the objection there or if it wanted to wait until it sent the jury right immediately to the jury room and then to raise the issue. I

did raise the issue and the Court recognized the fact that I was still in time to raise the issue.

As a matter of fact, when the notice, the note from the marshal that the jury had reached a verdict, this Honorable Judge was on his way to the court room to issue the following instruction which reads as follows—

The Court: I already had decided that I was not going to give the instruction based on the objection by the U.S. Attorney.

Mr. Monserrate: But this was the history. This was the fact that occurred. You were on your way to the court room and it was after the receiving of the information from the marshal that the jury has reached a verdict that the motion was denied.

The Court: I am not going to argue with you, Mr. Monserrate and I stand on the facts as I have stated them.

Mr. Monserrate: Your Honor, may I read this into the record, the note?

(461) The Court: I already stated that.

Mr. Monserrate: May I read it?

The Court: Go ahead.

Mr. Monserrate: It says, the note that the Judge was going to read to the jury is as follows: I quote, "The issue has been raised that the prosecution made a statement as to what he thought that Dr. De Thomas had said. At that time the defense counsel stated that that was incorrect. I instruct you that it is your recollection of Dr. De Thomas is stated or failed to state what controls and not what the United States Attorney says". I think, Your Honor, that instruction was vital and it was very important for defendant to have a fair trial in the sense that that is his specific defense and the jury should not have been deliberating with a mis-statement of fact of such a nature and of such a character that really could prejudice defendant's right and depending on the verdict, it will show definitely if it did in fact prejudice defendant's right to a fair trial.

The Court: Well, you were the one that stated that whether you were going to make it there or later on after they start deliberations. Let us go to the court. Do you want to state something, Mr. de Jesus?

Mr. de Jesus: I wanted to state that I raised an objection and I still had an objection as to the draft (462) prepared by Your Honor regarding the special instruction requested by the defendant.

(In open Court) 5:50 p.m.

The Court: Mr. Foreman, I have received a note from you to the effect that you have reached a verdict. Is that correct?

The Foreman: Yes, Your Honor.

The Court: Give the verdict form to the marshal and the marshal to the court room deputy. The verdict will be read. Stand up.

The Clerk: United States District Court For The District of Puerto Rico,. United States of America versus Manuel Lecaroz Pasarell, Criminal case 82-97, we the jury find the defendant, Manuel Lecaroz Pasarell guilty as charged in the only count of the indictment, signed by the foreman on April 22, 1983. You may be seated.

Mr. Monserrate: We would like to poll the jury, Your Honor.

The Court: Let us poll the jury.

The Clerk: Milton Rivera is this your verdict, sir?

Mr. Rivera: Yes.

The Clerk: William Colon, is this your verdict?

Mr. Colon: Yes.

* * *

Sentencing.

(12) I believe that the time has come that the defendant face up to reality and confront his acts and take it on the chin as the saying goes.

As to the sentence, as the saying goes, the sentencing as Your Honor very well knows is basically fashionable to protect the needs of society and to insure the proper respect for our laws.

In this case the factor of punishment must take into account the severity of the offense.

The amount of cocaine involved here was not large by any stretch of the imagination. However, what is important here is the purity of the amount of the cocaine involved which was 94 percent. That type of purity was testified to by the expert witness from the government, the DEA chemist; that that is practically what is known as pure cocaine that comes straight from the source.

This indicates that the defendant has had the ability to obtain cocaine straight from the source and is basically way up in the pyramid of the cocaine distribution scheme.

There is also the fact that during the taped transaction there was mention of other quantities of cocaine to be distributed; that they were on their way over to Puerto Rico from Miami and the mention of the sale of numerous (13) pounds of marijuana. This indicates that the defendant had an ability to distribute narcotics and was in fact doing so and apparently had been doing so for sometime.

Why for sometime, because it is not a rookie or a brand new individual who is distributing who comes into the scene of narcotics distribution, who has the ability to obtain cocaine this pure.

The person who obtains cocaine this pure is a person who has the contracts, who has been in the business or at least can be safely presumed that has been in the business for quite sometime.

There is also the factor of the deterrent issue that should be looked at at the time of sentencing.

I believe that in this particular case the deterrent factor is very important. It will give a message to the individuals who have been associated with the defendant or are presently associated with the defendant and other individuals in the same position as the defendant that they are not immune at all from the imposition and prosecution by the authorities for violation of the narcotics laws.

There has been sort of like a fallacy involved in all of these situations where a lot of persons in the same situation as the defendant feel that they can not be touched. That is not so. We must give a message out to that whole

* * *

(16) The Court: Thank you. Well, this is the type of case in which a Court has to give a lot of thought. Normally the lack of money is the basis claimed for most criminal activities.

This case presents the other side. This man is a millionaire. His financial report shows that he has more than a million dollars. The net worth is close to a million dollars. His family is also very wealthy.

So, the probation officer mentions on page 10 that in effect, according to the Probation Officer all the troubles of Mr. Lecaros Pasarel had its origin in the over protection given by the family to this gentleman and I tend to agree to a certain extent with the United States Attorney that the Probation Officer in his probation, in this report actually tends to adopt the theory of the defense that was not believed by the jury; that it was not believed by me.

I denied the motion for a new trial because I didn't believe the defense of insanity which I think was filmy, flimsy, transparent and that is the theory apparently adopted by the Probation Officer in this report.

I am not feeling sorry for you, Mr. Lecaroz but I do feel sorry believe me, deep in my heart I feel sorry for your family and specially for your mother that I know has suffered so much with the death of your brother and now what (17) is happening to you but inspite of all that I have to proceed to sentence you at this time.

It is adjudged in the only count of Criminal Case 82-97 that defendant, Manuel Lecaroz Pasarel is hereby committed to the custody of the Attorney General of the United States or his authorized representative for a period of 10 years and fined the sum of 25 thousand dollars.

The defendant is ordered to stand committed until the fine is paid or he is otherwise discharged by due course of law.

Furthermore, in accordance with the law, a special parole term of 8 years is also imposed.

It is recommended that this defendant be afforded psychological or psychiatric treatment if necessary.

That will be all.

Mr. Monserrate: Your Honor, in regard to this case, the defendant intends to appeal.

The Court: Hold it. Mr. Defendant, I have to issue—to give you certain warning, warnings as to your rights.

You are hereby advised that you have the right to appeal this sentence to the First Circuit Court of Appeals. You will do so within ten days. Any amount of time expended by you in jail on account of this offense will be credited although I believe that you are not in jail because bail was

* * *